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No. 07-1953

In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

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Questions Presented

1. Whether as-applied challenges to the disclosure requirements (reporting and disclaimers) imposed on electioneering communications by the Bipartisan Campaign Reform Act of 2002 ("BCRA") are foreclosed by *McConnell*'s statement that it was upholding the disclosure requirements against facial challenge "'for the entire range of electioneering communications' set forth in the statute." Mem. Op., App. 15a (quoting *McConnell v. FEC*, 540 U.S. 93, 196 (2003)).

2. Whether the disclosure requirements imposed on electioneering communications by BCRA are unconstitutional as applied to broadcast advertisements protected against prohibition by the appeal-to-vote test of *Wisconsin Right to Life v. FEC*. 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), because such communications are protected "political speech," not regulable "campaign speech," *see, e.g., id.* 2659 (distinguishing the two types of speech), and therefore are not "unambiguously related to the campaign of a particular federal candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

3. Whether the District Court erred in denying Citizens United a preliminary injunction to protect its broadcast advertisements against application of BCRA's disclosure requirements for electioneering communications.

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

Citizens United has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Introduction

This is an appeal of the denial of a preliminary injunction, but that procedural posture does not diminish the importance of this case or the need for this Court to decide the questions presented. In fact, it makes it more urgent because this Court recognized in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, (2007) ("*WRTL II*"), that cases involving electioneering communications will usually be brought in eve-of-election, preliminary-injunction contexts, *id.* at 2665-67 (controlling opinion of Roberts, C.J., joined by Alito, J.), 2705 (Souter, J., joined by Stevens, Ginsburg & Breyer, dissenting), and they will need to be resolved expeditiously in that context if effective protection of core First Amendment rights is to be provided. Otherwise, as happened to Wisconsin Right to Life, rights may be vindicated at some later date when the need to speak that gave rise to the challenge has been irretrievably lost.

Just as happened to Wisconsin Right to Life with its anti-filibuster ads, *see Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*") (per curiam), the FEC is again arguing, and the district court is agreeing, App. 15a, that facial-holding language in *McConnell v. FEC*, 540 U.S. 93 (2003), precludes as-applied challenges to a BCRA electioneering communication provision. This Court needs to quickly reverse this rejection of its unanimous *WRTL I* holding that a *McConnell* facial decision could *not* decide as-applied challenges, which holding applies equally here.

Buckley v. Valeo, 424 U.S. 1 (1976), held that expenditures may not be subject to compelled disclosure unless they are for communications "unambiguously

related to the campaign of a particular federal candidate," *Id.* at 80 (imposing the express advocacy construction to avoid "too remote" and "impermissibly broad" application of disclosure requirements). And *WRTL II* held that communications that are protected under its test ("susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," 127 S. Ct. at 2667) are protected "political speech" (also described as "issue advocacy"), *not* "campaign speech," *see, e.g., id.* at 2673, also described as "electioneering." *Id.* at 2667-69. Yet the FEC insists that speech protected by *WRTL II*'s "appeal to vote" test, so as to be neither "campaign speech" nor "electioneering," must yet be subject to disclosure requirements. The district court has followed the FEC's lead. App. 15a. This is inconsistent with *Buckley*'s "unambiguously campaign related" requirement, 424 U.S. at 81, which has been a guiding constitutional first-principle that this Court has applied in all of its campaign-finance law jurisprudence and which is equally applicable to disclosure requirements as to prohibitions.

Until December 14, 2007, it seemed possible that the FEC would not impose BCRA's disclosure requirements on electioneering communications that are protected "political speech" or "issue advocacy" under *WRTL II*'s appeal-to-vote test. The FEC was conducting rulemaking to implement this Court's *WRTL II* decision, and the rulemaking petition had urged the agency not to compel disclosure as to communications protected by *WRTL II*. *See* James Bopp, Jr. & Richard E. Coleson, *Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16*

(Electioneering Communications) (Sep. 29, 2007), *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/2007/james_madison_center_for_free_speech_eccomment16.pdf. But on December 14, the FEC refused and adopted a final rule that applies disclosure requirements on ads protected by *WRTL II*'s appeal-to-vote test. And it has now boldly asserted that "the government's interest in providing information to the public extends beyond speech about candidate elections and encompasses *activity that attempts to sway public opinion on issues* . . . ." Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 19 (emphasis added). This case should be accepted and decided by this Court so that the Court may reject the FEC's expansive assertion of regulatory authority over all issue advocacy—all at a time when the FEC is unable to even give advisory opinions because it lacks enough commissioners to have a quorum.

Opinions Below

The district court's unreported order and opinion denying preliminary injunction are reprinted in the Appendix at 1a and 2a.

Jurisdiction

The preliminary injunction motion was denied January 15, 2008. App. at 1a. Citizens United noticed appeal to this Court on January 16, 2008. App. at 20a. This Court has appellate jurisdiction over the interlocutory order of the three-judge court appointed under BCRA § 403. 28 U.S.C. § 1253.

Constitutional & Statutory Provisions

The following constitutional amendment, statutes, and regulations are appended (page numbers in brack-

ets): U.S. Constitution, First Amendment [21a]; 2 U.S.C. § 434(f)(1)-(3) [22a]; 2 U.S.C. § 441d [26a]; BCRA § 403 [28a]; 11 C.F.R. § 100.29 [29a]; 11 C.F.R. § 114.2(a)-(c) [36a].

Statement of the Case

This is an as-applied challenge to the constitutionality of **(a)** BCRA **§ 201**, 116 Stat. 88 (entitled "Disclosure of Electioneering Communications"), which added a new subsection "(f)" to § 304 of the Federal Election Campaign Act ("FECA") that requires reporting of electioneering communications and **(b)** BCRA **§ 311**, 116 Stat. 105, requiring that electioneering communications contain "disclaimers." *See* 11 C.F.R. § 110.11. BCRA **§ 201** is called herein the "**Reporting Requirement**," BCRA **§ 311** is called the "**Disclaimer Requirement**," and the requirements together are called the "**Disclosure Requirements**" for ease of identification. The Reporting Requirement is codified at 2 U.S.C. § 434(f). App. 22a. The Disclaimer Requirement is codified at 2 U.S.C. § 441d(a). App. 26a.

Plaintiff Citizens United is a nonstock, nonprofit (under 26 U.S.C. § 501(c)(4)), membership, Virginia corporation with its principal office in Washington, District of Columbia. Defendant Federal Election Commission ("FEC") is the government agency with enforcement authority over FECA.

Citizens United was founded in 1988. Its purpose is to promote the social welfare through informing and educating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society. Its current annual budget is about

$12 million. Citizens United has a related § 501(c)(3) entity called Citizens United Foundation ("CUF").

Citizens United is not a "qualified nonprofit corporation" because it receives corporate donations and engages in business activities. *See* 11 C.F.R. § 114.10 (exempting certain ideological, nonstock, nonprofit corporations from the electioneering communication prohibition).

One of the principal means by which Citizens United fulfills its purposes is through the production and distribution of documentary films. Its first major documentary film, in 2004, was entitled *Celsius 41.11: The Temperature at Which the Brain Begins to Die.* The film was a conservative response to Michael Moore's documentary *Fahrenheit 9/11* and was shown in over 100 theaters in 2004. It continues to be sold in DVD format. In 2005, Citizens United and CUF co-produced *Broken Promises: The United Nations at 60*, which was an exposé on the United Nations narrated by noted actor Ron Silver. This film was released in DVD format. In 2006, Citizens United and CUF co-produced two films: *Border War: The Battle Over Illegal Immigration* and *ACLU: At War With America. Border War* had a limited theatrical release and was sold on DVD. *ACLU* was released only in DVD format.

Broken Promises and *Border War* have competed for and won a number of awards from the motion picture industry. *Broken Promises* won a Special Jury Remi Award at the 2006 Houston International Film Festival. *Border War* won best feature documentary at the 2006 Liberty Film Festival, a Silver Remi Award at the 2007 Houston International Film Festival, and best feature documentary film honors from the American

Film Renaissance in February 2007. *Border War* also qualified for consideration under the Academy of Motion Picture Arts and Sciences' demanding criteria for nomination to the 79th Academy Awards in February 2007.

In 2007, CUF produced *Rediscovering God in America*, which is narrated by Newt and Calista Gingrich. This film premiered in Washington, D.C., and New York City and is now available in DVD format only. As of December 11, 2007, the film was the top selling historical documentary on Amazon.com.

In January 2008, Citizens United released a feature length documentary film on Senator Hillary Clinton entitled *Hillary: The Movie*. It is currently being shown in theaters and sold on DVDs. It includes interviews with numerous individuals and many scenes of Senator Clinton at public appearances. It is about 90 minutes in length. It does not expressly advocate Senator Clinton's election or defeat, but it discusses her Senate record, her White House record during President Bill Clinton's presidency, and her presidential bid. Some interviewees also express opinions on whether she would make a good president. A compendium book is being published by Thomas Nelson Publishers, which has purchased the book rights to the film and is paying Citizens United an advance royalty on sales.

When Citizens United produced *Celsius 41.11* in 2004, it ran national broadcast ads promoting the film. The original version of the ads had images and sound bites of President George Bush and Senator John Kerry, but those images and sound bites had to be deleted from the ads due to the electioneering communication prohibition. Prior to running the ads, Citizens

United received FEC Advisory Opinion 2004-30, stating that its film ads would qualify as electioneering communications and would not be exempt under the Press Exemption.

Citizens United intends to fund three television ads ("Ads")[1] to promote *Hillary: The Movie* that will meet

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[1]The script for "**Wait**" (10 seconds) follows:

[Image(s) of Senator Clinton on screen]

"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."

[Film Title Card]

[Visual Only] Hillary: The Movie.

[Visual Only] www.hillarythemovie.com.

"**Pants**" (10 seconds) is as follows:

[Image(s) of Senator Clinton on screen]

"First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit."

"Now, a movie about everything else."

[Film Title Card]

[Visual Only] Hillary: The Movie.

[Visual Only] www.hillarythemovie.com.

"**Questions**" (30-seconds) is as follows:

[Image(s) of Senator Clinton on screen]

"Who is Hillary Clinton?"

[Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . ."

[Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . ."

[Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . ."

"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie.

the electioneering communication definition at 2 U.S.C. § 434(f)(3). Citizens United has not, and will not, coordinate the production and broadcast of the Ads with any candidate, campaign committee, political committee, or political party.

The Ads will meet the electioneering communication definition at 2 U.S.C. § 434(f)(3) (and 11 C.F.R. § 100.29), because they (a) will be broadcast on Fox News cable and major network stations so that they (b) will be receivable by more than 50,000 persons, *see* http://gullfoss2.fcc.gov/ecd (Federal Communications Commission's Electioneering Communications Database), in states where caucuses, conventions, or primary elections will be selecting a party nominee, (c) will clearly reference Senator Clinton, a Democratic presidential candidate, and (d) will be made within 30 days before presidential primary elections in a series of states, depending on when the requested judicial relief is permitted, so the Ads may not be broadcasted without being burdened by the Disclosure Requirements. *See* http://www.fec.gov/info/charts_ec_dates_prez.shtml (electioneering communication periods).

Citizens United will broadcast the 30-second ad entitled "Questions" on Fox News cable, and may broadcast it on major television network stations, too. Citizens United will broadcast the 10-second ads "Wait" and "Pants" on major television network stations, but not on Fox News.

[Film Title Card]

[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.

[Visual Only] www.hillarythemovie.com.

The disclaimer language mandated by FEC rule, *see* 11 C.F.R. § 110.11, takes about 4 seconds to narrate, making 10-second ads virtually impossible and 30-second ads extremely difficult to do and have any significant time left for substantive communication.[2]

Citizens United's Ads reference www.hillarythemovie.com, which promotes showings of *Hillary: The Movie* in theaters and sales of *Hillary* on DVD. The DVD is also available from major national retailers, such as Amazon.com.

Citizens United wanted to begin running its Ads from mid-December 2007 to mid-January 2008 for its initial media buy. Citizens United now intends to begin broadcasting its ads during electioneering communication periods when it gets the relief requested herein. If Senator Clinton becomes the presidential nominee of her party, Citizens United plan to run the Ads (and possibly materially-similar ads) on Fox News cable (and possibly other broadcast outlets) within 30 days before the Democratic National Committee Convention (the electioneering communication period is July 29 to August 28, 2008) and within 60 days of the November general election (the electioneer-

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[2]The disclaimer requires (1) a spoken statement that "Citizens United is responsible for the content of this advertising," and (2) a written statement appearing on screen stating (a) "the name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication," (b) a statement that the communication is "not authorized by any candidate or candidates committee," and (c) a "clearly readable" statement that "Citizens United is responsible for the content of this advertising." 11 C.F.R. § 110.11(a)-(c).

ing communication period is September 5 to November 4, 2008). At these times, the Ads will also meet the electioneering communication definition. Citizens United believes that these are the times when the public's interest in Senator Clinton will be at its peak, which is the key to maximizing box office and DVD sales for *Hillary*.

Citizens United is in the process of making a documentary film about presidential candidate Senator Barack Obama, which it intends to have ready for release by June 2008.[3] Citizens United will have ads that are substantially similar to the Ads for *Hillary* to promote its Senator Obama documentary, but it cannot offer its ads for judicial review in advance because they are not prepared. They will not be prepared until the movie is completed because they will be based on scenes from the documentary. Nor can Citizens United seek an advisory opinion on these ads because they are neither begun nor completed and because the FEC is, for the foreseeable future, unable to issue advisory opinions due to an insufficient number of commissioners. These ads will also be run during electioneering communication periods and subject to the Disclosure Requirements.

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[3]Citizens United moved for leave to file an affidavit updating the facts of this case on January 9, 2008 (Doc. 35 (with affidavit attached)), including the details about the Senator Obama documentary, but the district court denied the motion (Doc. 36). *See also* Robert Stacey McCain, *'Hillary' Producer is Ready for Obama, Too*, Wash. Times, Jan. 15, 2008, *available at* www.washingtontimes.com/article/20080115/NATION/513973288 (information re Citizens United's documentary).

In addition to being protected issue advocacy, the Ads meet the requirements of the recently-enacted FEC rule recognizing a commercial-transaction, safe-harbor exception to the electioneering communication prohibition because each (**a**) "[p]roposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event," 11 C.F.R. § 114.15(b)(3)(ii); (**b**) "[d]oes not mention any election, candidacy, political party, opposing candidate, or voting by the general public," *id.* at § 114.15(b)(1); and (**c**) "[d]oes not take a position on any candidate's or officeholder's character, qualifications, or fitness for office." *Id.* at § 114.15(b)(2).

The FEC concedes that the two 10-second ads fit its regulatory commercial transaction exception, but it asserts that the 30-second ad, "Questions," does not fall within that safe harbor. Opp'n to 2d Mot. for Prelim. Inj. (Doc. 33) at 17. However, the FEC does concede that "on balance" the "Questions" ad is protected from prohibition under *WRTL II*'s appeal-to-vote test (127 S. Ct. at 2667). *Id.* Seven days after this suit was filed, the FEC was unsure whether the "Questions" was a protected ad—under its regulatory test or *WRTL II*'s test—and declared that it needed more time to make up its mind. Opp'n to Mot. for Consol'n (Doc. 19) at 8. Seventeen days later, the FEC finally concluded that the 30-second ad was protected under *WRTL II*.

The Ads, however, are still subject to BCRA's Disclosure Requirements because the FEC has recently refused to exclude from disclosure "electioneering communications" that meet this Court's appeal-to-vote test. *See* http://www.fec.gov/law/law_rulemakings.

shtml#ec07 (rulemaking documents, including requests to eliminate disclosure for ads not subject to electioneering communication prohibition). Notably, two commissioners voted against compelling disclosure for ads protected by *WRTL II*, but they were outvoted by other commissioners who wanted to require disclosure. *See Minutes of FEC Open Mtg.* (Nov. 20, 2007), *available at* http://www.fec.gov/agenda/2007/approve 07-79.pdf.

One of the chief concerns with the Reporting Requirement is the compelled disclosure of donors who may then be subject to various forms of retaliation by political opponents, a concern that *Buckley* recognized as inherent in compelled disclosure, whether or not it rises to the level of harassment proven by certain historically unpopular groups. 424 U.S. at 64.

Citizens United will have donors that it will be required to disclose (as to name and address), absent the judicial relief requested here, because it will pay for the Ads "exclusively from a segregated bank established to pay for electioneering communications permissible under 11 C.F.R. § 114.15" (rule implementing *WRTL II* by permitting corporate electioneering communications), to which donors will have "donated an amount aggregating $1,000 or more . . . since the first day of the preceding calendar year." 11 C.F.R. § 104.20.[4]

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[4]The present case is far from moot, but it is important to note that Citizens United's need for judicial relief will be ongoing because it also intends to broadcast materially-similar ads mentioning public figures who are candidates in materially-similar situations during future electioneering communication periods when public interest is at a peak.

Citizens United intends to broadcast its Ads without complying with the Disclosure Requirements, but it will not broadcast its Ads if it does not obtain the judicial relief presently requested. Instead, Citizens United will be forced to include the compelled speech of a disclaimer, which (**a**) requires it to mislead the public by identifying its speech as electioneering speech when it is not because this Court has held that such speech is not sufficiently related to elections to be regulated as electioneering and (**b**) deprives Citizens United of valuable time in its short and expensive broadcast Ads, which deprivation and burden is not justified by any constitutional or congressional authority. Adding the disclaimer will preclude Citizens United from running its 10-second ads[5] and will

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There is a strong likelihood that such similar situations will recur, given the facts that Plaintiff has engaged in similar activity in the past and that such activity is common and regularly recurring for it—as are conflicting electioneering communication periods.

[5]On November 15, 2007, Club for Growth PAC ("CFG-PAC") requested an FEC advisory opinion granting an exemption from disclaimer requirements for 10- and 15-second televised independent expenditure ads. CFG-PAC stated that the disclaimers "severely curtail[]" its speech as 31.6% to 36.9% of 10-second ads would be consumed by the spoken disclaimer. CFG- PAC also noted how such short "TV spots are important in the current media landscape with multiplication of viewing choices, increased competition from the Internet, and ever increasing costs." Club for Growth PAC, *Advisory Opin. Req.*, AO 2007-33, *available at* www. fec.gov (Pending Advisory Opinion Requests). The request is still pending and has been placed on the agenda

require it to revise its 30-second ad so as to be much less effective—both as to the issue advocacy contained in it and as a vehicle for promoting *Hillary: The Movie.*

And Citizens United will be compelled to file reports of its activity, which (1) requires it to mislead the public by reporting its speech as campaign speech when it is not; (2) deprives Citizens United of valuable time and resources in complying with reporting requirements, which deprivation and burden is not justified by any constitutional or congressional authority; and (3) will, in Citizens United's belief, based on long experience, substantially reduce the number of donors and amount of donations to Citizens United because many potential donors do not wish to be publicly so identified for a variety of legitimate reasons.

In such an event, Citizens United will be deprived of its constitutional rights under the First Amendment to the United State Constitution by these substantial burdens on its highly-protected, core "political speech," *WRTL II*, 127 S. Ct. at 2659 (twice), 2660, 2664, 2665 (thrice), 2666 (twice), 2669, 2671-74, and will suffer irreparable harm. There is no adequate remedy at law.

The procedural history, as relevant to the present appeal, is that, based on these facts and claims, Citi-

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for the Commission's January 24, 2008 meeting. The draft advisory opinion submitted by the FEC Office of General Counsel argues against the exemption. *See* FEC Office of General Counsel, *Draft AO*, Agenda Doc. No. 08-03, *available at* www. fec.gov (Pending Advisory Opinion Requests). Of course, the FEC lacks sufficient commissioners to issue a formal advisory opinion.

zens United filed its *Verified Complaint for Declaratory and Injunctive Relief* on December 13, 2007, and moved, inter alia, for a preliminary injunction (Doc. 5), expedition (Doc. 4), and consolidation of the hearing on the preliminary injunction with the hearing on the merits (Doc. 6). The consolidation motion was denied (Doc. 29) and the preliminary injunction motion, as to broadcasting the Ads without the burdens of the Disclosure Requirements, was denied on January 15, 2008. App. 1a. The district court relied primarily on its assertions that *McConnell* precluded as-applied challenges and *WRTL II* didn't decide the disclosure issue. Mem. Op., App. 15a. On January 16, 2008, a notice of appeal was filed. App. 20a.

The Questions Presented Are Substantial

While Citizens United suffers substantial harm to its First Amendment rights because it was denied injunctive relief, the substantial questions raised in this appeal also include vindication of core political rights generally and proper application of this Court's precedents by federal courts and agencies.

I. Cases of This Sort Must Be Decided and Appealed as Preliminary Injunctions.

This is an appeal of the denial of a preliminary injunction. That does not diminish the importance of this case or the need for this Court to decide the questions presented.

In *WRTL II*, Wisconsin Right to Life originally sought a preliminary injunction in order to broadcast its anti-filibuster, grassroots-lobbying ads at an effective time. The District Court first dismissed that case, deciding that certain facial-challenge language in

McConnell, 540 U.S. 93, precluded as-applied challenges, which this Court reversed. *WRTL I*, 546 U.S. 410. Ultimately, this Court decided in the summer of 2007 that WRTL's ads were constitutionally protected all along, so that WRTL should have been able to broadcast them in the summer of 2004. *WRTL II*, 127 S. Ct. 2652. For that to have happened, WRTL should have gotten a preliminary injunction, expeditiously followed by declaratory and permanent injunctive relief.

WRTL II recognized that, given the eve-of-election definition of electioneering communications, there would be a need for expeditious judicial relief in that context, so the opinion set out standards for speedy resolution of challenges. *Id.* at 2665-67. And the dissent expressly pointed to preliminary injunctions as the remedy for making such challenges workable. *Id.* at 2705 (Souter, J., joined by Stevens, Ginsburg & Breyer, dissenting). The necessary implication is that preliminary injunctions *should* be available in such cases and should not be rejected based on standards that would make it impossible for a preliminary injunction to *ever* be granted.

In the context of electioneering communications, by definition, and core political speech in general, the rejection of a preliminary injunction motion will often deny a group's ability to engage in timely protected political speech—as happened to WRTL as to the timely broadcast of its anti-filibuster ads in the summer of 2004. Protection of core political speech in this context requires that preliminary injunctions be readily available to protect such speech. This is a substantial issue.

II. As-Applied Constitutional Challenges to BCRA Are Permitted.

Despite this Court's expeditious, unanimous rejection of a nearly-identical argument in *WRTL I*, 546 U.S. 410, the FEC is again arguing, and the district court is agreeing, that *McConnell*'s facial upholding of the BCRA Disclosure Requirements on electioneering communications precludes future as-applied challenges. The effect of the lower court's ruling is to bar all future as-applied challenges, at least in the District of Columbia.

Specifically, the district court decided, App. 15a, that Citizens United did not have a substantial likelihood of success on the merits because this Court said in *McConnell* that "*Buckley* amply supports application of FECA § 304's disclosure requirements to the *entire range* of 'electioneering communications.'" 540 U.S. at 196 (emphasis added). Of course, this is facial-challenge language, closely akin to the *McConnell* statement at issue in *WRTL I*: "We uphold *all applications* of the primary definition and accordingly have no occasion to discuss the backup definition." *McConnell*, 540 U.S. at 190 n.73. *WRTL I* rejected the district court's notion that such facial-challenge language precluded as-applied challenges, concluding that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." *WRTL I*, 546 U.S. at 411-12.

This Court needs to decide whether as-applied challenges to the Disclosure Requirements continue to be available, consistent with *WRTL I*, or whether such challenges are precluded by *McConnell*'s facial deci-

sion. This is a substantial issue.

III. Disclosure May Not Be Compelled for Non-"Campaign Speech."

Buckley held that expenditures may not be subjected to compelled disclosure unless they are for communications "unambiguously related to the campaign of a particular federal candidate," 424 U.S. at 80. To assure that "the relation of the information sought to the purposes of the Act [was not] too remote," *id.*, this Court imposed the express advocacy construction:

> To insure that the reach of § 434(e) [requiring disclosure of expenditures] is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is *unambiguously related* to the *campaign* of a particular federal candidate. [*Id.* (emphasis added; footnote omitted).]

The Court returned to this "unambiguously related" language in summing up its analysis of the expenditure disclosure provision, indicating that, as construed, the provision "shed[s] the light of publicity on spending that is *unambiguously campaign related.*" *Id.* at 81 (emphasis added).

Buckley applied this unambiguously-campaign-related requirement to (1) expenditure limitations, *id.* at 42-44; (2) PAC status and disclosure, *id.* at 79; (3) non-PAC *disclosure* of contributions and independent

expenditures,[6] *id.* at 79-81; and (4) contributions. *Id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act [regulating elections], for they are connected with a candidate or his campaign."). Because *Buckley* expressly applied this unambiguously-campaign-related requirement to the *disclosure of expenditures*, *id.* at 80, it has direct application here.

Buckley employed two tests to implement this unambiguously-campaign-related requirement. First, to implement the requirement for PAC status, the Court created the major-purpose test for "political committees": "To fulfill the purposes of the Act [regulating elections] they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. "Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related.*" *Id.* (emphasis added). This test assures that expenditures are "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80. Second, to implement the unambiguously-campaign-related requirement as to expenditures, the Court created the express-advocacy test, i.e., whether a communication contains explicit words expressly advocating the election or defeat of a clearly identified candi-

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[6] "Independent expenditure" is a term of art referring to an express-advocacy communication that is not coordinated with a candidate so as to become a contribution. *See* 2 U.S.C. § 431(17).

date. *Id.* at 44, 80.

WRTL II applied the unambiguously-campaign-related requirement to eliminate overbreadth in the regulation of BCRA's new "electioneering communications" when it stated its test for functional equivalence: "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. *WRTL II* reiterated the requirement when it said that the corporate-form corruption interest does not "extend[] beyond *campaign* speech." *Id.* at 2672 (emphasis added). So *WRTL II*'s appeal-to-vote test is the application of the unambiguously-campaign-related requirement to electioneering communications, just as the express-advocacy test was the Court's application of the requirement to reporting independent expenditures and the major-purpose test was the application of the requirement to PAC disclosure.

WRTL II also reaffirmed that the purpose of the unambiguously-campaign-related requirement—and its appeal-to-vote test applying it—is twofold. Negatively, it confines government within the pale of its constitutional authority to regulate elections. *Buckley*, 424 U.S. at 13 ("The constitutional power of Congress to *regulate federal elections* is well established and is not questioned by any of the parties in this case." (footnote omitted; emphasis added)). Positively, it protects what the Court calls "'genuine issue ads,'" *WRTL II*, 127 S. Ct. at 2659 (*quoting McConnell*, 540 U.S. at 206 & n.88), 2668 (same), 2673 (same), or "issue advocacy." *Id.* at 2667. *WRTL II* explained that "[i]ssue advocacy conveys information and educates,"

id. at 2667, and reaffirmed *Buckley*'s statement that, because issue advocacy and candidate advocacy often look alike, bright-line tests are required to protect issue advocacy from being chilled, and any doubt must be resolved in favor of free speech:

> [W]e have acknowledged at least since *Buckley* . . . that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." 424 U.S. at 42. Under the test set forth above, that is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor. [*Id.* at 2669.]

Lest there be any doubt as to the necessity of speech-protective lines, *WRTL II* reiterated that: "the benefit of any doubt [goes] to protecting rather than stifling speech," *id.* at 2667 (*citing New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964)), "in a debatable case, the tie is resolved in favor of protecting speech," *id.* at 2669 n.7, and "the benefit of the doubt [goes to] speech, not censorship." *Id.* at 2674.

In other words, free speech about public issues, especially political ones, is so central and essential to our system of government that it is better to allow some theoretically-regulable speech to go unrestricted than to chill public debate. Thus, *WRTL II* reaffirmed what the Court held in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002): "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *WRTL II*, 127 S. Ct. at 2670 (*quoting Ashcroft*, 535 U.S. 234 at 255). To do otherwise would "'turn[] the First Amendment upside down.'" *Id.* (citation omitted).

WRTL II applied the appeal-to-vote test (an unambiguously-campaign-related test) to determine that ads protected under it are protected "political speech," i.e., "issue advocacy," *not* "campaign speech," i.e., "electioneering." *Id.* at 2667-69, 2673. It is inconsistent with the unambiguously-campaign-related requirement to require disclosure of speech that is neither "campaign speech" nor "electioneering." Ads that are, by definition, not "electioneering" must not be treated as "*electioneering* communications" for disclosure purposes. The district court's decision otherwise raises a substantial issue.

IV. Citizens United Should Have Received a Preliminary Injunction.

Just as WRTL should have received a preliminary injunction to protect its political speech in 2004, so Citizens United should receive one now to protect its constitutionally-protected political speech from unwarranted burdens.

Four factors govern preliminary injunctions in the District of Columbia Circuit:

> To warrant preliminary injunctive relief, the moving party must show (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. [*Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citations omitted) (preliminary injunction standards). *See also Apotex Inc. v. U.S. Food and Drug Admin.*, – F. Supp. 2d –, WL 2695006, at *3 (D.D.C. 2007) (applying same standards for temporary restraining order).]

"A district court must 'balance the strengths of the requesting party's arguments in each of the four required areas," and "[i]f the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." *England*, 454 F.3d at 297.[7]

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[7] *England* cited a decision from this Court for the proposition that "'[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," *id.* (citation omitted), but neither *England* nor the case it cited involved First Amendment expression and association rights in the core area of political speech. So the status quo argument has no applicability to the present case, which is rather governed by the holding of *Elrod v. Burns*, 427 U.S. 347, 373 (1976), that "the loss of First Amendment freedoms, for

A. There Is Likely Success on the Merits.

The FEC concedes, and the district court decided, that Citizens United's Ads are protected from the electioneering communication prohibition by *WRTL II*'s appeal-to-vote test. App. 14a.

This leaves the purely legal question of whether "electioneering communications" that do not contain an "appeal to vote," 127 S. Ct. at 2667, may still be subject to compelled disclosure. Since the Ads are not an "appeal to vote," then necessarily under *WRTL II* they are protected "political speech" ("issue advocacy"), not "campaign speech," *id.* at 2673, or "electioneering," *id.* at 2667-69, and are thus not "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. As such, they are not subject to either prohibition or disclosure. Therefore, Citizens United has a likelihood of success on the merits, and a preliminary injunction should have been granted.

Instead, the district court ignored the constitutional analysis, set forth above, as to the unambiguously-campaign-related requirement and largely ignored the argument that *WRTL II* imposed this requirement on

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even minimal periods of time, unquestionably constitutes irreparable injury." *See England*, 454 F.3d at 299 ("*Elrod* involved political speech and freedom of expression"). Where loss of First Amendment freedoms is occurring, maintaining the status quo is unjust and unjustified. Nor does a presumption of the constitutionality of a statute apply in the face of the First Amendment's strict and intermediate standards of review, which presume unconstitutionality by requiring the government to specially justify burdens on expression and association.

electioneering communications, relying instead on the notions that *McConnell* precludes this as-applied challenge and *WRTL II* didn't decide the issue. App. 15a. This presents a substantial issue for this Court to decide.

B. The Other Injunction Elements Are Met.

The other elements for granting a preliminary injunction rise or fall with the likelihood of success on the merits. If Citizens United's arguments are sound on the merits element, then there is irreparable harm to Citizens United if relief is denied, while others will not be harmed and the public interest will be served, if relief is granted. The district court candidly acknowledged that its analysis turned on its perception of the likelihood of success on the merits: "If Citizens had made more of a showing that it had a chance of prevailing in this Court on the merits, these kinds of harms might have warranted preliminary relief." App. 17a-18a. The other elements of the preliminary injunction standard will be briefly addressed to complete the analysis.

Irreparable Harm. Citizens United will suffer irreparable harm unless it receives the requested injunctive relief. Just as in *WRTL II*, 127 S. Ct. 2652, WRTL forever lost the opportunity to broadcast its fully protected issue ads because it did not receive a preliminary injunction—which was plainly irreparable harm—so, too, will Citizens United be irreparably harmed if it is unable to run its Ads. Citizens United wishes to engage in First Amendment activities that are "'both certain and great . . . actual not theoretical,'" *England*, 454 U.S. at 297 (citation omitted), are "of such imminence that there is a 'clear and present' need

for equitable relief to prevent irreparable harm," *id.* (citation and emphasis omitted), and in which "the injury [is] beyond remediation." *Id.* Plaintiff is barred by criminal penalties from engaging in First Amendment expression and association activities it wishes to do, which "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373.

The FEC, however, argued below that Citizens United had not provided "specific evidence" of a "reasonable probability" of threats, harassment and retaliation if it's donors are disclosed, as it claims is required by *McConnell*, 540 U.S. at 198-99. Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 32-33. However, this Court held in *Buckley* that compelled disclosure involves inherent harm. 434 U.S. at 64. Furthermore, the FEC argues that, in any event, if a preliminary injunction is not granted, Citizens United would only be subject to an FEC investigation, which it claims does not constitute irreparable harm. Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 35. This argument, if accepted, would preclude all preliminary injunctions.

These issues present substantial questions for this Court to decide.

Injury to Others. The questions of harm to others and serving the public interest are, of course, inversely proportional to the likelihood of success on the merits. As the District of Columbia Circuit said in *Delaware & H. Ry. Co. v. United Transp. Union*, 450 F. 3d 603, 620 (D.C. Cir. 1971), in cases where harms are claimed on both sides, the Court should look to the merits.

However, the FEC has argued here that it will be

harmed if it is denied the opportunity to enforce a statute. Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 50. But such generalized "harm," if accepted, would always defeat a requested preliminary injunction. First Amendment protections would, therefore, often be meaningless. This presents a substantial question for this Court to decide.

Public Interest. As with harm to others, the question of the public interest follows the likelihood of success on the merits. Clearly, "[t]he First Amendment, in particular, serves significant societal interests." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978). It is in the public interest for Americans to be able to associate and express themselves freely where there is no cognizable governmental interest justifying restriction.

The Court below, however, found that the public interest would be served here by denying a preliminary injunction because of the public's interest in disclosure. Mem. Op., App. 18a. As the FEC put it below, "the relief sought by Citizens United would prevent the achievement of Congress's goals of "'shed[ding] the light of publicity" on campaign financing,' *McConnell*, 540 U.S. at 231 (quoting *Buckley*, 424 U.S. at 81)." Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 50. But of course whether "*campaign* financing" is at issue in this case is the question before this Court on the merits. This presents a substantial question for this Court to decide.

Thus, whether a preliminary injunction is available in these instances is a substantial question. It is a concrete application of the question of whether preliminary injunctions are going to actually be available to

protect free speech in a timely manner. This question and its answer affect not just Citizens United but also the public at large at a time when rolling primaries, followed by conventions backed up to 60-day pre-general-election electioneering periods are creating extended periods of burden on free expression—expression that this Court in *WRTL II* indicated should not be so burdened.

Conclusion

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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[Doc. 38, filed Jan. 15, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED Plaintiff,	)	
	)	Civil Action No. 07-2240
v.	)	(ARR, RCL, RWR)
	)	(Three-Judge Court)
FEDERAL ELECTION COMMISSION, Defendant.	)	

ORDER

Now before the Court comes plaintiff Citizens United's motions [5 and 23] for preliminary injunction seeking to enjoin defendant Federal Election Commission from enforcing challenged provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Upon consideration of the parties' filings, oral argument, the applicable law, and the facts of this case, it is hereby

ORDERED that motion [5] for preliminary injunction is DENIED. It is further hereby

ORDERED that motion [23] for preliminary injunction is DENIED as moot with respect to BCRA § 203 as applied to plaintiff's "Questions" ad, and DENIED with respect to the remaining challenges.

SO ORDERED.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C.

Lamberth and Richard W. Roberts, on January 15, 2008.

[*Editor's Note: The following Memorandum Opinion (Doc. 39) was amended by an Errata (Doc. 40). Editing notes of the changes are included in the following text.*]

[Doc. 39, filed Jan. 15, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED Plaintiff,	)	
	)	Civil Action No. 07-2240
v.	)	(ARR, RCL, RWR)
	)	(Three-Judge Court)
FEDERAL ELECTION COMMISSION, Defendant.	)	

MEMORANDUM OPINION

For the reasons that follow we deny Citizens United's ("Citizens") motions for a preliminary injunction to enjoin the Federal Election Commission ("FEC") from enforcing provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[1] with respect to Citizens'

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[1] Pub. L. No. 107–155, 116 Stat. 81 (2002), codified at 2 U.S.C. § 431 *et seq.*

advertisements for a movie—*Hillary: The Movie*—and its distribution of *The Movie* through cable TV video on-demand.

I.

Citizens United is a nonprofit membership corporation, tax-exempt under Internal Revenue Code § 501(c)(4). (Am. Compl. ¶ 5.) Citizens produced a movie titled *Hillary: The Movie*. (*Id.* Ex. 2; Notice [30] Regarding Joint Stip.) *The Movie* focuses on Senator Hillary Rodham Clinton's "Senate record, her White House record during President Bill Clinton's presidency, . . . her presidential bid," and includes "express opinions on whether she would make a good president." (Am. Compl. ¶ 14.) Citizens plans to distribute *The Movie* in January or [*2] February 2008 through theaters, video on-demand ("VOD") broadcasts, and DVD sales. (*Id.*) Citizens notified the court on January 7, 2008, that it had released *The Movie* for "public sale and exhibition." (Notice [30] Regarding Joint Stip.); *see* http://www.hillarythemovie.com (last visited Jan. 11, 2008) (offering *The Movie* on DVD for $23.95 and promoting screenings of the film in seven movie theaters across the country). *The Movie*'s release date coincides with the dates when many states will hold primary elections or party caucuses. Senator Clinton is a presidential candidate in those states. (Am. Compl. ¶ 17.) Citizens intends to fund at least three television advertisements—two 10-second advertisements, "Wait"[2] and "Pants,"[3] and one 30-second advertise

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[2] The script for the television advertisement, "Wait" reads as follows:

ment, "Questions"[4]—to coincide with the release of its

[Image(s) of Senator Clinton on screen]

"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."

[Film Title Card]

[Visual Only] Hillary: The Movie.

[Visual Only] www.hillarythemovie.com

[3] The script for the television advertisement, "Pants" reads as follows:

[Image(s) of Senator Clinton on screen]

"First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit."

"Now, a movie about the everything else."

[Film Title Card]

[Visual Only] Hillary: The Movie.

[Visual Only] www.hillarythemovie.com

[4] The script for the television advertisement, "Questions" reads as follows:

[Image(s) of Senator Clinton on screen]

"Who is Hillary Clinton?"

[Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . ."

[Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . ."

[Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . ."

"If you thought you knew everything about Hillary Clinton . . . wait til you see the movie.

[Film Title Card]

[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.

[Visual Only] www.hillarythemovie.com

movie. (*Id.* Ex. 1.) The [*3] advertisements promote *The Movie* and direct viewers to *The Movie*'s website for more information about the film and how to see or purchase it. (*Id.* ¶ 19.) If Senator Clinton becomes the Democratic presidential nominee, Citizens plans to broadcast the three advertisements and possibly other advertisements within 30 days before the Democratic National Committee Convention and within 60 days before the November general election—both periods are within BCRA's definition of an electioneering communication. (*Id.* ¶ 20); 2 U.S.C. § 434(f)(3)(A)(i)(II)(bb). Citizens has elected not to broadcast its advertisements pending resolution of this litigation. (Am. Compl. ¶ 26.) It has entered into negotiations to broadcast *The Movie* through the "Political Movies" component of a new nationwide VOD channel, "Elections 08," but has decided to forego the opportunity pending resolution of the current litigation because, according to Citizens, the broadcast would be banned under BCRA and, even if this were not so, the broadcast would require Citizens to disclose certain information and make certain statements as described below. (*Id.* ¶ 28–30.)

BCRA amended the Federal Election Campaign Act of 1971 ("FECA").[5] BCRA, Pub. L. No. 107–155, 116 Stat. 81 (2002) (codified at 2 U.S.C. § 431 et seq.). Passed in 2002, it represented "the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of big money' campaign contributions." *McConnell v. FEC*,

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[5] Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 2 USC § 431 *et seq.*).

540 U.S. 93, 115 (2003) (internal citation omitted). BCRA introduced a new system for [*4] regulating what it termed "electioneering communications." Under BCRA § 201, an "electioneering communication" is:

> any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate
>
> . . .

2 U.S.C. § 434(f)(3)(A). For presidential candidates, the communication must also be capable of being received by 50,000 or more persons. *See* 11 C.F.R. § 100.29(b)(3)(ii). Citizens recognizes that under this statutory definition, both its advertisements and a VOD[6] broadcast of *The Movie* would be electioneering

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[6] The parties did not raise the issue of whether VOD was within the definition of "electioneering communication." However, a broadly worded FEC regulation defining "electioneering communications" indicates that VOD would be a "broadcast, cable, or satellite communication" because

communications. (Am. Compl. ¶¶ 17, 29.) Electioneering communications are subject to a host of restrictions imposed by BCRA. Three are relevant here: § 203, § 201, and § 311. Section 203 prevents corporations and labor unions from funding electioneering communications out of their general treasury funds, unless the communication is made to its stockholders or members, to get out the vote, or to solicit donations for a segregated corporate fund for political purposes. 2 U.S.C. § 441b(b)(2). This provision does not bar [*5] electioneering communications paid for out of a segregated fund that receives donations only from stockholders, executives and their families. 2 U.S.C. §§ 441b(b)(2)(C), (b)(4)(A).[7] Any electioneering communication that is not prohibited is subject to the disclosure requirements of § 201 and the disclaimer requirements of § 311, which are set out in part II.B.

Citizens' complaint, filed on December 13, 2007,[8]

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it is "disseminated through the facilities of a . . . cable television system." *See* 11 C.F.R. §§ 100.29(b)(1), (b)(3)(i) (indicating that "broadcast, cable, or satellite communications" include communications "aired, broadcast cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system").

[7] Corporations and labor unions may also contribute to Political Action Committees, which are permitted to make electioneering communications. *See McConnell*, 540 U.S. at 204 (citing *FEC v. Beaumont*, 539 U.S. 146, 162–63 (2003)).

[8] On December 14, 2007, Citizens' motion for a three-judge district court was granted [14] pursuant to BCRA §

contains two major claims: (1) that § 203's prohibition of corporate disbursements for electioneering communications violates the First Amendment on its face and as applied to *The Movie* and to the 30-second advertisement "Questions"[9]; and (2) that BCRA § 201 requiring disclosure and § 311 requiring disclaimers are unconstitutional as applied to Citizens' three advertisements (and to *The Movie*, if Citizens broadcasts it in a manner that does not violate § 203).

II.

The court will not issue a preliminary injunction unless the movant shows that it has "1) a substantial likelihood of success on the merits, 2) that it would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *Omar v. Harvey*, 479 F.3d 1, 18 (D.C. Cir. 2007) (citing *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 [***6**] F.3d 738, 746 (D.C. Cir. 1995)). Granting injunctive relief is an "extraordinary and drastic remedy," and it is the movant's obligation to justify, "by a clear showing," the court's use of such a measure. *Mazurek*

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403 and 28 U.S.C. § 2284. On January 10, 2008, the three-judge court held an expedited hearing on the motions for preliminary injunctions.

[9] Plaintiff's challenge regarding the prohibition of "Questions" will be denied as moot. The FEC, in its filings and at oral argument, conceded that the advertisement is exempt from the Prohibition. (Opp'n to 2d Mot. for Prelim. Inj. at 17.)

v. Armstrong, 520 U.S. 968, 972 (1997).

A.

We will analyze first Citizens' likelihood of prevailing on the merits of its claims regarding *The Movie*. In *McConnell*, the Supreme Court upheld § 203 on its face, rejecting claims that the financing of "electioneering communications" constituting express advocacy or its functional equivalent were within the protection of the First Amendment. 540 U.S. at 203–09. *McConnell* did not, however, "purport to resolve future as-applied challenges." *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2661 (2007) (citation omitted) ("*WRTL*"). The Chief Justice's opinion in *WRTL* stated that an advertisement could not be considered the functional equivalent of express advocacy unless it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[10] *Id.* at 2667. To promote the objectivity of this analysis, courts are to disregard contextual evidence of the corporation's

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[10] The parties agree, as do we, that the Chief Justice's formulation is now the governing test for the functional equivalent of express advocacy. Although the Court s opinion in *WRTL* was fragmented, the Chief Justice's opinion approved the judgment of the district court on the narrowest grounds. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted).

intent in running an advertisement.[11] *See id.* at 2668.

Citizens wants us to enjoin the operation of BCRA § 203 as a facially unconstitutional [*7] burden on the First Amendment right to freedom of speech. The theory is that with respect to § 203, *WRTL* narrowed *McConnell* to such an extent that it "left the door open to facial invalidation based on the sort of circumstances that have now arisen." (2d Mot. for Prelim. Inj. Mem. at 2). For Citizens to prevail on this claim, we would have to overrule *McConnell*, which is to say that Citizens has no chance of prevailing. Only the Supreme Court may overrule its decisions. The lower courts are bound to follow them. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

With respect to Citizens's as-applied claims regarding *The Movie*, the first question under Chief Justice Roberts' *WRTL* opinion—and as it turns out, the last question—is whether the film is express advocacy or its functional equivalent. If it is, *McConnell* makes it likely that Citizens would not win on the merits of its claim that the First Amendment permits it to broadcast the movie within the electioneering communica-

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[11] *WRTL* discounted evidence that included the corporation's other candidate-related advocacy, the timing of the advertisements, and the advertisement's reference to an Internet address that directed viewers to a website containing express advocacy against the election of candidates for federal office. 127 S. Ct. at 2668–69 (Opinion of Roberts, C.J.).

tions period as currently funded. Citizens contends that *The Movie* is issue speech and, as it stated in oral argument, that issue speech is any speech that does not expressly say how a viewer should vote. The trouble is that the controlling opinion in *WRTL* stands for no such thing. Instead, if the speech cannot be interpreted as anything other than an appeal to vote for or against a candidate, it will not be considered genuine issue speech even if it does not expressly advocate the candidate's election or defeat. *WRTL*, 127 S. Ct. at 2667.

The Movie does not focus on legislative issues. *See id.*; 11 C.F.R. § 114.15(b). *The Movie* references the election and Senator Clinton's candidacy, and it takes a position on her character, qualifications, and fitness for office. *See id.*; 11 C.F.R. § 114.15(b). Dick Morris, one [*8] political commentator featured in *The Movie*, has described the film as really "giv[ing] people the flavor and an understanding of why she should not be President." Dick Morris, Hillary's Threat, Address (Mar. 2007) (available at www.citizensunited.org/blog/?entryid=4563815). After viewing *The Movie* and examining the 73-page script at length, the court finds Mr. Morris's description to be accurate. *The Movie* is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.[12] [*9] *The Movie*

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[12] A selection of excerpts from the movie are indicative of the film's message as a whole and serve to demonstrate the difficulty that this court had in its ultimately unsuc-

cessful attempt to find a reasonable interpretation of *The Movie* that would take it out of the *WRTL* "functional equivalent to express advocacy" classification.

Excerpts include statements by the film's narrator, one of several political commentators or another interviewee stating:

"She's driven by the power. She's driven to get the power. That is the driving force in her life." (Am. Compl. Ex. 2 at 1.)

"She is the expert at not saying what she believes—she will run on attacking Republicans, and being the first woman president—oh isn't that amazing, she's a woman she can walk and talk." (*Id.*)

"She is steeped in controversy, steeped in sleaze, that's why they don't want us to look at her record." (*Id.* at 1–2.)

"Over the past 16 years Hillary Clinton has undoubtedly become one of the most divisive figures in America. How this makes her suited to unite the country as the next president is troubling to many." (*Id.* at 6.)

"I mean think of what it says about Hillary Clinton that she was willing to put up with his open philandering, with anything in a skirt who wanders before his eyesight—all for the power—at least with Bill Clinton he was just good time Charlie. Hillary's got an agenda and she's willing to put up with that to be [P]resident of the [U]nited [S]tates, she's got a to do list when she gets to the White House." (*Id.* at 21–22.)

"I think the American people have a right to as much of a public record as possible about Hillary Clinton. Those records should be released before the 2008 elections so that we can learn a lot more about exactly how much influence she had in the White House, what her positions were in the White House, and how she acted in the White House." (*Id.*

is thus the functional equivalent of express advocacy.

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at 60.)

"Finally, before America decides on our next president, voters should need no reminders of [] what's at stake—the well being and prosperity of our nation." (*Id.* at 68–69.)

"It[ ]s been said and I agree with it that this is the most personal political choice that Americans make. They want, they—their personality traits, their—will they consider a person that they could trust, that they would like, that they were comfortable with, and that's [where] think Hillary Clinton as a candidate has great defects." (*Id.* at 69.)

"If she reverts to form, Hillary Clinton will likely be in the future what she has been in the past, which is a person, a woman, a politician of the left, and I don't think that's going to [be] good for the security of the United States." (*Id.* at 70.)

"I think we are at a very critical time in this country. I can tell you beyond a shadow of a doubt that uh, the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief." (*Id.* at 71.)

"[T]his vote comes down to one thing: liberty. Do you believe in liberty or don't you? Economic liberty, free speech, protecting our borders, protecting our country from terrorism—the issue is liberty." (*Id.*)

"[W]e must not ever underestimate this woman. We must not ever understate her chances of winning. We mustn't be lolled into a state of security and complacency by the new found moderation that she likes to talk about. And we must never forget the fundamental danger that this woman [poses] to every value that we hold dear." (*Id.* at 72).

In sum, plaintiff's counsel's representation at oral argument that the movie did not exhort viewers to vote against Senator Clinton, is simply untrue.

See WRTL, 127 S. Ct. at 2667 (setting out the "functional equivalent" standard). As such, it falls within the holding of *McConnell* sustaining, as against the First Amendment, § 203 insofar as it bars corporations from funding electioneering communications that constitute the functional equivalent of express advocacy. There is no substantial likelihood that Citizens will prevail on its as-applied challenge with respect to *The Movie*. **[*10]**

B.

Citizens' proposed advertisements present a different picture. The FEC agrees that Citizens may broadcast the advertisements because they fall within the safe harbor of the FEC's prohibition regulations implementing *WRTL*. They did not advocate Senator Clinton's election or defeat; instead, they proposed a commercial transaction—buy the DVD of *The Movie*. *See WRTL*, 127 S. Ct. at 2667; 11 C.F.R. § 114.15(b). Although Citizens may therefore run the advertisements, it complains that requirements of § 201 and § 311 of BCRA, 2 U.S.C. §§ 434(f)(2), 441d, impose on it burdens that violate the First Amendment.

Section 201 is a disclosure provision requiring that any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes—among other things—the names and addresses of anyone who contributed $1,000 or more in aggregate to the corporation for the purpose of furthering electioneering communications. §§ 434(f)(1), (2)(F); 11 C.F.R. § 104.20(c)(9). Section 311 is a disclaimer provision. 2 U.S.C. § 441d. For advertisements not authorized by a candidate or her political committee,

the statement "____ is responsible for the content of this advertising" must be spoken during the advertisement and must appear in text on-screen for at least four seconds during the advertisement. § 441d(d)(2). In addition, such advertisements are required to include the name, address, and phone number or web address of the organization behind the advertisement. § 441d(a)(3).

Citizens thinks that § 201 and § 311 are unconstitutional because its advertisements do not constitute express advocacy or the functional equivalent of express advocacy. The argument is that the Supreme Court's *WRTL* decision narrowed the constitutionally permissible scope of what could be considered an electioneering communication. Under Citizens' reading of *WRTL*, [*11] anything that is not express advocacy or not "susceptible of [a] reasonable interpretation other than as an appeal to vote for or against a specific candidate" cannot be constitutionally regulated by Congress under BCRA. *See* 127 S. Ct. at 2667.

We do not believe *WRTL* went so far. The only issue in the case was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period. Although *McConnell* upheld the § 203 prohibition on its face, the Court left open the issue that was presented in *WRTL*, reserving it for decision on an as-applied basis. In contrast, when the *McConnell* Court sustained the disclosure provision of § 201 and the disclaimer provision of § 311, it did so for the "entire range of electioneering communications" set forth in the statute. *McConnell*, 540 U.S. at 196; *see also id.* at 230–31 (discussing § 311). Citizens's advertisements

obviously are within that range.

Although Citizens styles its argument as an as-applied challenge, it offers only one distinction between its advertisements and the mine-run of speech that constitutes electioneering communication under BCRA. The distinction, so goes the argument, is that Citizens' speech is constitutionally protected, as *WRTL* holds. [*Editor's Note: The following sentence was struck by the Errata, and footnote 13 was moved where indicated below.*] Whether the Supreme Court will ultimately adopt that line as a ground for holding the disclosure and disclaimer provisions unconstitutional is not for us to say.[13] We know that the Supreme Court has not adopted that line as a ground for holding the disclosure and disclaimer provisions unconstitutional, and it is not for us to do so today. And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment. [*Editor's Note: Footnote 13 was moved by the Errata to here.*] *See FEC v. Mass. Citizens for Life*, 479 [***12**] U.S. 238, 259–62 (1986) (striking down a prohibition, and noting that the disclosure provisions will apply to the newly permitted speech); *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 297–98 (1981) (same); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791–92 & n.32 (1978) (discussing how

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[13] [*Editor's Note: The Errata changed the following "See" citation to a "But See" citation.*] *See Majors v. Abell*, 361 F.3d 349, 356–57 (7th Cir. 2004) (Easterbrook, J., dubitante).

disclosure provisions can help offset the coercive aspects of corporate speech).

The *McConnell* Court did suggest one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals and thus "impose an unconstitutional burden on the freedom to associate in support of a particular cause." 540 U.S. at 198. To this, the Court added that the plaintiff must show a "reasonable probability that the compelled disclosure of... contributors' names will subject them to threats, harassment, or reprisals." *Id.* (quoting *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982)). Citizens' memorandum in support of its motion states that there may be reprisals, but it has presented no evidence to back up this bald assertion. In that respect, Citizens is thus in a similar position as the parties in *McConnell* who made the same assertion but presented no specific evidentiary support. *See* 540 U.S. at 199.

We therefore hold that Citizens has not established the requisite probability of prevailing on the merits of its arguments against the disclosure and disclaimer provisions—§ 201 and § 311, respectively.

C.

Citizens tells us that without a preliminary injunction it will not be able to broadcast *The Movie*, that it will have to disclose the identity of its contributors to the FEC if it runs the advertisements, and that some portion of the time it purchased for the advertisements would be consumed by the disclaimers BCRA requires. If Citizens had made more of a showing that it [*13] had a chance of prevailing in this court on the merits,

these kinds of harms might have warranted preliminary relief. But in the face of *McConnell*'s ruling that the disclosure and disclaimer provisions are constitutional and that the restriction on corporate speech advocating the defeat of a candidate does not violate the First Amendment, Citizens is unable to raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714–15 (D.C. Cir. 2001), *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986), *Washington Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

As to the remaining factors governing preliminary relief, we cannot say that enjoining enforcement of the BCRA provisions at issue would serve the public interest in view of the Supreme Court's determination that the provisions assist the public in making informed decisions, limit the coercive effect of corporate speech, and assist the FEC in enforcing contribution limits. *See McConnell*, 540 U.S. at 196, 205, 231.

* * *

Citizens' motion for preliminary injunction with respect to the § 203 Prohibition as applied to "Questions" shall be DENIED as moot as set forth in footnote 9 and shall be DENIED with respect to all other claims. A separate order shall issue this date.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on January 15, 2008.

[Doc. 40, filed Jan. 16, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED Plaintiff,	)	
	)	Civil Action No. 07-2240
v.	)	(ARR, RCL, RWR)
	)	(Three-Judge Court)
FEDERAL ELECTION COMMISSION, Defendant.	)	

ERRATA

This court's Memorandum Opinion [39] dated January 15, 2008 is amended as follows:

1. The third sentence of the second full paragraph on page 11 is stricken. This sentence read: "Whether the Supreme Court will ultimately adopt that line as a ground for holding the disclosure and disclaimer provisions unconstitutional is not for us to say."
2. Footnote 13 is moved to the end of the sentence beginning on page 11 that reads: "And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment."

3. Footnote 13 is changed from a *See* citation to a *But See* citation.

SO ORDERED.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on January 16, 2008.

[Doc. 41, filed Jan. 16, 2008]

United States District Court
District of Columbia

Citizens United, ***Plaintiff,***	
v.	**Civil No. 07-2240-RCL**
Federal Election Commission, ***Defendant.***	THREE-JUDGE COURT

Notice of Appeal to U.S. Supreme Court

Notice is given that Plaintiff hereby appeals to the United States Supreme Court this Court's Order (Jan. 14, 2008; Doc. 38) denying Plaintiff's Motion for Preliminary Injunction (Doc. 5) insofar as the Order denies a preliminary injunction as to Count 1 (regarding disclosure requirements for Plaintiff's advertisements) of the Amended Verified Complaint for Declaratory and Injunctive Relief (Doc. 22). Appeal is taken

pursuant to 28 U.S.C. § 1253 (providing for direct appeal from interlocutory decisions of three-judge courts).

Respectfully submitted,

/s/ James Bopp, Jr.
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**pro hac vice motion granted*

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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2 U.S.C. § 434(f)(1)-(3)

§ 434. Reports

* * *

(f) *Disclosure of electioneering communications.*

(1) *Statement required.* Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $ 10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement.* Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for

permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) *Electioneering communication.* For purposes of this subsection –

(A) *In general.*

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which –

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus

of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions.* The term "electioneering communication" does not include –

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure

under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)).

(C) *Targeting to relevant electorate.* For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons–

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

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2 U.S.C. § 441d

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in section 434(f)(3) of this title)) (2 U.S.C. § 434(f)(3)), such communication -

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent

street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

* * *

(d) *Additional requirements*

* * *

(2) *Communications by others.* Any communication described in paragraph (3) of subsection (a) of this section which is transmitted through radio or television shall include, in addition to the requirements of that paragraph, in a clearly spoken manner, the following audio statement: "_____ is responsible for the content of this advertising." (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor). If transmitted through television, the statement shall be conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

BCRA § 403(a), 116 Stat. at 113-14

Sec. 403. Judicial Review

(a) Special Rules for Actions Brought on Constitutional Grounds. – If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

11 C.F.R. § 100.29

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section –

(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) *Publicly distributed* means aired, broadcast,

cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons –

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal

Communications Commission's Web site, http://www.fcc.gov. A link to that site is available on the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) Can be received by 50,000 or more persons means –

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the sta-

tion's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour –

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that –

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) Electioneering communication does not include any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or edito-

rial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office; or

(6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

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11 C.F.R. § 110.11(a)-(c)

§ 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).

(a) *Scope.* The following communications must include disclaimers, as specified in this section:

(1) All public communications, as defined in 11 CFR 100.26, made by a political committee; electronic mail of more than 500 substantially similar communications when sent by a political committee; and all Internet websites of political committees available to the general public.

(2) All public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications, as defined in 11 CFR 100.26, by any person that solicit any contribution.

(4) All electioneering communications by any person.

(b) *General content requirements.* A disclaimer required by paragraph (a) of this section must contain the following information:

(1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state that the communication has been paid for by the authorized political committee;

(2) If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee, or agent; or

(3) If the communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

(c) *Disclaimer specifications*—(1) *Specifications for all disclaimers.* A disclaimer required by paragraph (a) of this section must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.

* * *

(4) *Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate.* In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication not authorized by a candidate or a candidate's authorized committee that is transmitted through radio or television or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio or television or through any broadcast, cable, or satellite transmission, must include the following audio statement, "XXX is responsible for the content of this advertising," spoken clearly, with the blank to be filled in with the name of the political committee or other

person paying for the communication, and the name of the connected organization, if any, of the payor unless the name of the connected organization is already provided in the "XXX is responsible" statement; and

(ii) A communication transmitted through television, or through any broadcast, cable, or satellite transmission, must include the audio statement required by paragraph (c)(4)(i) of this section. That statement must be conveyed by an unobscured full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the communication. To be clearly readable, the statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the disclaimer statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(4)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest type size used in the communication.

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2-14-08

29 pgs

No. 07-953

In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the three-judge district court abused its discretion in denying appellant's motion for a preliminary injunction against the enforcement of reporting and disclaimer requirements governing appellant's planned advertisements.

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In the Supreme Court of the United States

No. 07-953

CITIZENS UNITED, APPELLANT

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FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the three-judge district court denying appellant's motion for a preliminary injunction (J.S. App. 2a-20a) is not yet reported.

JURISDICTION

The decision of the three-judge district court was issued on January 15, 2008. A notice of appeal was filed on January 16, 2008 (J.S. App. 20a-21a), and the jurisdictional statement was filed on January 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

In the district court, appellant argued, inter alia, that the reporting and disclaimer requirements imposed by Sections 201 and 311 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat.

88, 105 (2 U.S.C. 434(f)(2) (Supp. V 2005); 2 U.S.C. 441d(a) (2000 & Supp. V 2005)), are unconstitutional as applied to three of appellant's planned broadcast advertisements. The district court denied appellant's motion for a preliminary injunction against enforcement of those requirements pending the court's resolution of the case on the merits. J.S. App. 2a-20a. Appellant now seeks this Court's review of that denial of preliminary injunctive relief and has moved for expedited briefing and argument this spring.[1]

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[1] The question whether this Court has jurisdiction over the instant appeal is not free from doubt. Under BCRA § 403(a)(1) and (3), 116 Stat. 114, suits challenging the constitutionality of any BCRA provision may be heard by a three-judge district court within the District of Columbia, and the three-judge court's "final decision" is reviewable by direct appeal to this Court. For suits filed on or before December 31, 2006, that three-judge court procedure was the exclusive mechanism for pursuing a constitutional challenge to BCRA. See BCRA § 403(d)(1), 116 Stat. 114; cf. *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-5292, 2004 WL 1946452 (D.C. Cir. Sept. 1, 2004). BCRA § 403(d)(2), 116 Stat. 114, states, however, that "[w]ith respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action." Appellant elected to have its suit heard by a three-judge district court. See J.S. App. 7a n.8.

Under 28 U.S.C. 1292(a)(1), the courts of appeals have jurisdiction to review "[i]nterlocutory orders of the district courts" granting or denying preliminary injunctive relief, "except where a direct review may be had in the Supreme Court." This Court has jurisdiction to review the denial of a preliminary injunction "in any civil action, suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. 1253 (emphasis added). This case was not "required" to be decided by a three-judge court insofar as appellant could have presented its constitutional claims to a single-judge court. On the other hand, under BCRA § 403(d)(2), appellant was entitled to a three-judge district court as of right, and once appellant elected that option, BCRA "required" that a three-judge

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(d); 2 U.S.C. 438(a)(8) (Supp. V 2005); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. Since 1910, federal law has required disclosure of information related to the financing of federal election campaigns. See *Buckley* v. *Valeo*, 424 U.S. 1, 61 (1976) (per curiam). After Congress enacted a new disclosure regime in 1974, see *id.* at 62-64, this Court held that the new provisions were constitutional on their face, *id.* at 64-84. The Court explained that disclosure serves the important government interests of (1) providing the electorate with information on campaign financing "in order to aid the voters in evaluating those who seek federal office," *id.* at 66-67; (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light

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court be convened to decide the case. That may be sufficient to trigger the application of Section 1253. If this Court were to determine that it lacks jurisdiction over the instant interlocutory appeal, the district court's "final decision" in the case would still be reviewable by this Court pursuant to BCRA § 403(a)(3), 116 Stat. 114, and the grant or denial of preliminary injunctions by three-judge district courts in cases in which the plaintiff elects a three-judge panel would be reviewable in the court of appeals (and in this Court via a petition for certiorari).

of publicity," *id.* at 67; and (3) "gathering the data necessary to detect violations of the contribution limitations" that were simultaneously enacted, *id.* at 68.

The disclosure requirements at issue in *Buckley* pertained to "the use of money or other objects of value 'for the purpose of . . . influencing'" nominations or elections to federal office. 424 U.S. at 77 (quoting 2 U.S.C. 431(f) (Supp. IV 1974)). In order to avoid "serious problems of vagueness," the Court held that, as applied to organizations whose major purpose was not campaign activity, the disclosure provisions would "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," *i.e.*, "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 76, 79-80 (footnote omitted). Consistent with earlier decisions regarding compelled disclosure, the Court held that the challenged provisions, so construed, would unconstitutionally infringe on associational rights only in the limited circumstance when such disclosure would result in a "reasonable probability" of "threats, harassment, or reprisals" against an organization or its members. *Id.* at 68, 74.

3. Based on its assessment of evolving federal campaign practices and abuses during the years following *Buckley*, Congress subsequently determined, inter alia, that entities had been funding broadcast advertisements designed to influence federal elections "while concealing their identities from the public," including by "hiding behind dubious and misleading names." *McConnell* v. *FEC*, 540 U.S. 93, 196-197 (2003) (quoting *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 237 (D.D.C.) (per curiam)). Through BCRA, Congress amended FECA to require disclosure about the sources of funding for "electioneer-

ing communication[s]." The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; and (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate. 2 U.S.C. 434(f)(3)(A)(i) (Supp. V 2005).

The disclosure provisions at issue in this case include both reporting requirements, 2 U.S.C. 434(f)(2) (Supp. V 2005); 11 C.F.R. 104.20, and disclaimer requirements, 2 U.S.C. 441d (Supp. V 2005); 11 C.F.R. 110.11.[2] The reporting provisions state that any "person" (defined to include any corporation, labor organization, or other group, 2 U.S.C. 431(11)) expending more than $10,000 to produce or air an electioneering communication must file a statement with the Commission. 2 U.S.C. 434(f)(1) (Supp. V 2005). The statement must identify the person making the disbursement, the amount and date of the disbursement, and, in the case of an electioneering communication made by a corporation, "the name and address of each person who made a donation aggregating $1,000 or more to the corporation * * * for the purpose of furthering electioneering communications." 11 C.F.R. 104.20(c); 72 Fed. Reg. 72,913 (2007) (to be codified at 11

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[2] The FEC recently amended its electioneering communication reporting regulations to conform to this Court's decision in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), and to address the reporting requirements for corporations and labor organizations. See *Electioneering Communications*, 72 Fed. Reg. 72,899, 72,913-72,915 (2007) (to be codified at 11 C.F.R. 104.20, 114.15 (2008)). Appellant's planned advertisements would be subject to the revised provisions that will be contained in 11 C.F.R. 104.20(c)(7)(ii) and (9) (2008). See 72 Fed. Reg. at 72,899 (providing that revised regulations became effective on publication date).

C.F.R. 104.20(c)(9) (2008)). If the disbursement is made out of a "segregated bank account established to pay for electioneering communications," the corporation making the electioneering communication need only identify those individuals who contributed $1000 or more to that segregated account. 2 U.S.C. 434(f)(2)(E) (Supp. V 2005); 72 Fed. Reg. at 72,913 (to be codified at 11 C.F.R. 104.20(c)(7) (2008)).

BCRA's disclaimer provisions require that a televised electioneering communication include on the screen (1) "the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication," and (2) a statement "that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. 441d(a)(3) (Supp. V 2005); 11 C.F.R. 110.11(b)(3). The communication must also include a statement that the entity funding the communication "is responsible for the content of this advertising," and that statement must be (1) made orally by a representative of the person making the communication, and (2) printed "for a period of at least 4 seconds" on at least four percent of the television screen. 2 U.S.C. 441d(d)(2) (Supp. V 2005); 11 C.F.R. 110.11(c)(4).

4. Soon after BCRA was enacted, appellant and other plaintiffs challenged the constitutionality of numerous BCRA provisions on their face, including the reporting and disclaimer requirements that are at issue in this appeal. In *McConnell*, this Court rejected the plaintiffs' facial challenges to those disclosure provisions. See 540 U.S. at 194-202, 230-231.

In upholding the reporting requirements applicable to "electioneering communications," the Court in *McConnell* explained that "the important state interests

that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA." 540 U.S. at 196. For that reason, the Court concluded, "*Buckley* amply supports application of [the] disclosure requirements to the entire range of 'electioneering communications.'" *Ibid.* The Court also endorsed the conclusion of the district court in that case that the plaintiffs' challenge to BCRA's reporting requirements "ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.* at 197 (quoting *McConnell*, 251 F. Supp. 2d at 241). Three other Justices in *McConnell*, while rejecting much of the Court's reasoning, agreed that BCRA's reporting requirements are generally constitutional because they "substantially relate" to the informational interest identified in the Court's opinion. See *id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part); see *id.* at 286 & n.*.

Consistent with *Buckley*, the Court in *McConnell* recognized that, under certain limited circumstances, "compelled disclosures may impose an unconstitutional burden on the freedom to associate in support of a particular cause." 540 U.S. at 198. The Court explained that, under the governing standard, disclosure may not be required in circumstances where there is a "reasonable probability" that such disclosure "would subject identified persons to 'threats, harassments, and reprisals.'" *Id.* at 198-199 (quoting *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982)). The Court agreed with the district court that the evidence in

McConnell had "not establish[ed] the requisite 'reasonable probability' of harm to any plaintiff group or its members," but the Court noted that its rejection of the facial challenge to the reporting requirements did "not foreclose possible future challenges to particular applications of that requirement." *Id.* at 199.

The Court in *McConnell* also upheld BCRA's disclaimer requirements. 540 U.S. at 230-231. Chief Justice Rehnquist, writing for eight Members of the Court (see *id.* at 224 & n.*), explained that BCRA's "inclusion of electioneering communications in the [pre-existing disclaimer] regime bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." *Id.* at 231 (quoting *Buckley*, 424 U.S. at 81).

5. In *McConnell*, this Court rejected a facial challenge to BCRA § 203, 116 Stat. 91 (2 U.S.C. 441b(b)(2) (Supp. V 2005)), which prohibits corporations or labor unions from using general treasury funds to pay for electioneering communications. 540 U.S. at 204-206. Four years later, in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL*), the Court sustained an as-applied challenge to that prohibition. Two Members of the Court framed the relevant inquiry as whether the advertisements at issue constituted "express advocacy or its functional equivalent." *Id.* at 2664 (opinion of Roberts, C.J.). Under their approach, "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. Those two Members concluded that, "[u]nder this test, WRTL's three ads are plainly not the functional equivalent of express advocacy." *Ibid.* Three other Justices concluded that BCRA § 203 is un-

constitutional on its face and would have overruled the Court's contrary holding in *McConnell*. *Id.* at 2684-2687 (Scalia, J., concurring in part and concurring in the judgment).

6. Appellant Citizens United is a nonprofit Virginia corporation with tax-exempt status under 26 U.S.C. 501(c)(4). J.S. App. 3a. Appellant has produced a film about Senator Hillary Clinton entitled "Hillary: The Movie," which appellant intends to distribute through theaters, video on-demand broadcasts, and DVD sales. *Ibid.* Appellant has planned since at least January 2007 to distribute that film "in all of the early [presidential] primary states." *Hannity & Colmes: Analysis with Dick Morris* (Fox News television broadcast Jan. 22, 2007), 2007 WLNR 1299920. Appellant has also produced three television advertisements for the movie. J.S. App. 3a-5a & nn.2-4.

In December 2007, appellant filed suit in federal district court, challenging BCRA's application to both the film and the proposed advertisements. See J.S. App. 7a-8a. With respect to the film itself, appellant contended that BCRA § 203's ban on the use of general treasury funds for "electioneering communications" is unconstitutional on its face and as applied to "Hillary: The Movie." See *id.* at 8a, 10a-11a. With respect to the advertisements for the film, the FEC conceded in the district court that, under this Court's decision in *WRTL*, appellant could not constitutionally be foreclosed from financing those advertisements with general treasury funds. See *id.* at 14a. The parties disagreed, however, on the question whether BCRA's reporting and disclaimer provisions were constitutional as applied to the advertisements. See *id.* at 8a, 14a.

7. The three-judge district court denied appellant's request for preliminary injunctive relief on both of appellant's claims. J.S. App. 2a-20a.

a. The district court held that appellant had no substantial likelihood of prevailing on its as-applied challenge with respect to the film itself because the film is the functional equivalent of express advocacy. J.S. App. 9a-14a. The court stated that the film "is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." *Id.* at 11a. The jurisdictional statement does not challenge the district court's denial of preliminary injunctive relief with respect to the movie.

b. The district court held that appellant had also failed to establish the requisite likelihood of success at this stage on its contention that BCRA's reporting and disclaimer provisions are unconstitutional as applied to appellant's proposed advertisements. J.S. App. 14a-17a. The court explained that this Court in *McConnell* had upheld those provisions "for the 'entire range of electioneering communications' set forth in the statute." *Id.* at 15a (quoting *McConnell*, 540 U.S. at 196). The court rejected appellant's contention that this aspect of *McConnell* had been superseded by *WRTL*, stating that "[t]he only issue in [*WRTL*] was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period." *Ibid.* The district court also observed that, in various contexts, this Court "has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." *Id.* at 16a.

The district court recognized that this Court in *McConnell* had "suggest[ed] one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals and thus 'impose an unconstitutional burden on the freedom to associate in support of a particular cause.'" J.S. App. 17a (quoting *McConnell*, 540 U.S. at 198). The court explained, however, that while appellant's "memorandum in support of its motion [for a preliminary injunction] states that there may be reprisals," appellant had "presented no evidence to back up this bald assertion." *Ibid.* The court observed that appellant "is thus in a similar position as the parties in *McConnell* who made the same assertion but presented no specific evidentiary support." *Ibid.*

ARGUMENT

The district court correctly denied appellant's motion for preliminary injunctive relief, and the court's decision rests on a straightforward application of settled legal principles. The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

1. In determining whether to issue a preliminary injunction, a district court considers the plaintiff's likelihood of success on the merits, whether the plaintiff will suffer irreparable injury in the absence of an injunction, the prospect of injury to other parties if an injunction is entered, and the public interest in granting or withholding temporary relief. J.S. App. 8a; see *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). This Court reviews the district court's application of the preliminary-injunction factors under an abuse-of-discretion standard. See *id.* at 931-932; see also *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428 (2006).

In denying appellant's request for preliminary injunctive relief, the district court relied principally on its determination that appellant had failed to show a substantial likelihood of success on the merits. See J.S. App. 17a-18a. That holding is correct and provides a fully sufficient basis for the district court's ruling.

In contending that the district court abused its discretion by denying preliminary injunctive relief against enforcement of BCRA's reporting and disclaimer requirements, appellant bears a particularly heavy burden. Appellant's effort to alter the status quo by seeking an exemption from BCRA's coverage is contrary to the established principle that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). In addition, this Court's holding in *McConnell* that the challenged reporting and disclaimer provisions are constitutional on their face at a minimum strengthens "[t]he presumption of constitutionality which attaches to every Act of Congress." *Walters* v. *National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). As Chief Justice Rehnquist explained, "[a]n injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held BCRA facially constitutional." *Wisconsin Right to Life, Inc.* v. *FEC*, 542 U.S. 1305, 1305-1306 (2004) (in chambers) (citing *McConnell*, 540 U.S. at 189-210).[3]

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[3] In addition, appellant's claim that it will suffer irreparable harm in the absence of preliminary injunctive relief is called into question by the fact that appellant has planned since at least January 2007 to distribute *Hillary: The Movie* (see p. 9, *supra*), but waited until December 2007

2. In *McConnell*, eight Members of this Court—including three Justices who would have held BCRA § 203's prohibition on the use of corporate treasury funds for "electioneering communications" to be unconstitutional on its face—agreed that the reporting and disclaimer requirements applicable to such communications are facially valid. See pp. 6-7, *supra*. In particular, the opinion for the Court stated that "*Buckley* amply supports application of [FECA's] disclosure requirements to the entire range of 'electioneering communications.'" 540 U.S. at 196. That holding controls this case.

Contrary to appellant's suggestion (J.S. 17), the government does not contend that *McConnell* "precludes future as-applied challenges" to BCRA's reporting and disclaimer requirements. The Court in *McConnell* made clear that as-applied challenges *are* available, stating that the Court's "rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement." 540 U.S. at 199. The Court further explained that, to succeed in such an as-applied challenge, a plaintiff must demonstrate a "reasonable probability" that the forced disclosures "would subject identified persons to 'threats, harassment, and reprisals.'" *Id.* at 198-199 (quoting *Brown*, 459 U.S. at 100). See Appellee's Br. at 25 n.7, *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (No. 04-1581) (identifying, inter alia, this type of as-applied challenge to the BCRA disclosure requirements as one left open in *McConnell*). The *McConnell* Court observed that, al-

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to file its current suit. Although appellant suggests (J.S. 2-3) that it deferred filing suit until the completion of a recent FEC rulemaking (see note 2, *supra*), appellant did not participate in the rulemaking itself.

though some plaintiffs in that case had expressed concern that disclosure might lead to such harms, no plaintiff had made a sufficient evidentiary showing that those injuries were actually likely to occur. 540 U.S. at 199.

Similarly in the instant case, the district court did not read *McConnell* as foreclosing all as-applied challenges to BCRA's reporting and disclaimer requirements. To the contrary, the district court specifically noted that "[t]he *McConnell* Court did suggest one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals." J.S. App. 17a. The district court concluded, however, that appellant could not prevail in such an as-applied challenge because appellant (like the plaintiffs in *McConnell*) had raised the possibility of reprisals but had offered no evidence to support that concern. *Ibid.*[4] Similarly in this Court, appellant suggests in passing (J.S. 12) that its donors "may * * * be subject to various forms of retaliation by political opponents," but it identifies no evidence supporting that assertion, let alone any basis for concluding that the

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[4] Appellant cites *Buckley*, 424 U.S. at 64, for the proposition that the prospect of reprisals is "inherent in compelled disclosure." J.S. 12. The Court in *Buckley* noted that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64. Read as a whole, however, *Buckley* and subsequent decisions make clear that, while compelled disclosure inherently creates some risk of reprisal and may under some circumstances effect an unconstitutional burden on speech and associational rights, the likelihood of such a burden cannot be presumed but must be proved through particularized evidence. See *McConnell*, 540 U.S. at 197-199 (summarizing Court's decisions).

district court's assessment of the record reflected an abuse of discretion.[5]

In arguing that BCRA's reporting and disclaimer provisions are unconstitutional as applied to its own advertisements, appellant makes no meaningful effort to satisfy the prerequisites for the type of as-applied challenge that the Court in *McConnell* specifically approved. Rather, appellant contends that it may not constitutionally be subjected to the reporting and disclaimer requirements because its advertisements, while concededly "electioneering communication[s]" within the meaning of BCRA, are not the "functional equivalent" of express advocacy under the lead opinion in *WRTL*. J.S. 20-22, 24. The *McConnell* Court's statement that BCRA's reporting requirements may constitutionally be applied "to the entire range of 'electioneering communications,'" 540 U.S. at 196, *combined with* the Court's express recognition that those requirements are subject

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[5] Appellant has maintained a separate segregated fund (commonly referred to as a "PAC") for more than 13 years and has disclosed the names and addresses of its donors pursuant to federal law. See Citizens United Political Victory Fund, *Statement of Organization* (June 15, 1994) <http://query.nictusa.com/cgi-bin/fecimg/?94039043287+0>; FEC, *Citizens United Political Victory Fund* (visited Feb. 12, 2008) <http://query.nictusa.com/cgi-bin/fecimg/?C00295527> (disclosure database report). During that time, appellant has disclosed approximately 1000 contributions from individuals in amounts of $200 or more, including address and employer information for most of the individuals. FEC, *Individuals Who Gave to this Committee: Citizens United Political Victory Fund* (visited Feb. 12, 2008) <http://query.nictusa.com/cgi-bin/com_ind/C00295527/> (disclosure database report). Appellant's inability to produce any evidence of actual reprisals is particularly striking in light of the large volume of donor information that it has previously released. In addition, appellant was one of the plaintiffs in *McConnell*, yet it failed in that case as in this one to present evidence that disclosure of its donors would likely lead to retaliation.

to a *different sort* of as-applied challenge, *id.* at 199, strongly suggests that the Court did not contemplate as-applied challenges based solely on the content of the relevant communication.

3. In all events, appellant's as-applied challenge plainly lacks merit. The principal thrust of appellant's argument is that, because *WRTL* precludes the application of BCRA § 203's treasury-financing ban to appellant's advertisements, application of BCRA's reporting and disclaimer provisions is necessarily barred as well. J.S. 24. That argument rests on the premise that the authority of Congress and state legislatures to require disclosure of financing sources is no greater than its authority to bar the use of corporate treasury funds to pay for particular communications. This Court has repeatedly rejected that proposition.[6]

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), for example, this Court held that the defendant corporation was constitutionally entitled to use its general treasury funds to engage in express advocacy of federal electoral outcomes, notwithstanding the ban imposed by 2 U.S.C. 441b on use of corporate treasury funds for that purpose. 479 U.S. at

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[6] The plaintiff in *WRTL* did not link BCRA's treasury-financing and disclosure requirements in the manner that appellant now advocates, but instead affirmatively disavowed any challenge to BCRA's reporting and disclaimer provisions. WRTL's brief in this Court explained: "Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimers and public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue." Appellee's Br. at 49, *WRTL*, *supra* (Nos. 06-969 & 06-970).

263-264. The Court explained that, given the particular characteristics of the corporation involved, the corporation's campaign-related spending would not pose the danger at which Section 441b was directed. See *ibid.* The Court made clear, however, that the corporation remained subject to the applicable FECA disclosure requirements (but not, of course, to the additional requirements applicable to separate segregated funds). See *id.* at 262 (explaining that "MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures").

The Court has taken a similar approach to corporate spending in the context of ballot initiatives. In *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), this Court struck down a Massachusetts law that prohibited banks and business corporations from making certain expenditures for the purpose of influencing the outcome of public referenda. *Id.* at 767-768, 786-795. In holding that the plaintiff corporation had a First Amendment right to engage in such advocacy, the Court specifically contrasted public referenda from "the quite different context of participation in a political campaign for election to public office." *Id.* at 788 n.26. The Court observed, however, that even in the context of corporate expenditures on referenda, which could not constitutionally be prohibited, "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. The

Court's subsequent decisions have continued to recognize that, while advocacy of particular referendum outcomes is entitled to full constitutional protection, persons who engage in such advocacy may be required to identify the sources of their funding. See *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 202-203, 205 (1999); *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 294 n.4, 298-299 (1981).

This Court has also held that "those who for hire attempt to influence legislation" may be required to disclose the sources and amounts of the funds they receive to undertake lobbying activities. *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954). The Court explained that, if Congress could not mandate the provision of that information, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* at 625. In *Bellotti*, this Court indicated that "the First Amendment protects the right of corporations to petition legislative and administrative bodies," 435 U.S. at 792 n.31, but cited *Harriss* with approval as support for the proposition that compelled disclosure of financing information is permissible, *id.* at 792 n.32. The Court has thus repeatedly recognized that legislatures may require the disclosure of information concerning the source of funds used to influence public policy, even when that influence itself cannot be constitutionally prohibited, and indeed even when it occurs outside the election context.

Appellant relies on the *Buckley* Court's determination that a prior FECA disclosure provision was limited to "spending that is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80; see J.S. 1-2, 18-22. That reliance is misplaced. The

Court in *Buckley* announced the express advocacy test (for which the reference to "unambiguously campaign related" spending, 424 U.S. at 81, was shorthand) as a *construction* of the statutory phrase "for the purpose of . . . influencing [federal elections]." *Id.* at 78-81; see pp. 3-4, *supra*. This Court has since recognized that *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-192; see *WRTL*, 127 S. Ct. at 2670 n.7 (opinion of Roberts, C.J.). With respect to disclosure requirements in particular, this Court's precedents squarely refute appellant's contention that Congress's power is limited to communications that are "unambiguously related" to an identified federal candidate's campaign. The decisions discussed above make clear that compelled disclosure of financing information may be permissible even when the disbursements in question have *nothing* to do with any candidate election.[7]

4. Appellant contends (J.S. 13) that BCRA's disclaimer provisions "require[] [appellant] to mislead the

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[7] Appellant contends that, "[i]n addition to being protected issue advocacy," the advertisements at issue here are properly regarded as proposals for commercial transactions, such as box office sales or DVD purchases of "Hillary: The Movie." J.S. 11; see J.S. 10. To the extent that appellant's advertisements constitute commercial speech, however, they are if anything entitled to less rather than more constitutional protection. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562-563 (1980) ("The Constitution * * * accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."). The film that appellant seeks to promote, moreover, was found by the district court to be the functional equivalent of express advocacy, J.S. App. 9a-14a, and appellant has not challenged that determination in this Court.

public by identifying its speech as electioneering speech when it is not." That assertion is baseless. The challenged disclaimer provisions require that an "electioneering communication" broadcast on television must include a written statement on the screen that (a) identifies "the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication," (b) states "that the communication is not authorized by any candidate or candidate's committee," and (c) states that the entity funding the electioneering communication "is responsible for the content of this advertising." See 2 U.S.C. 441d(a)(3) and (d)(2) (Supp. V 2005); 11 C.F.R. 110.11(a)(4), (b)(3) and (c)(4)(iii). The disclaimer provisions further require that such an advertisement include an oral statement that the entity funding the electioneering communication "is responsible for the content of this advertising." See 2 U.S.C. 441d(d)(2) (Supp. V 2005); 11 C.F.R. 110.11(a)(4) and (c)(4)(i). Those provisions do not require appellant to characterize its advertisements as "electioneering" speech or anything else, but simply require appellant to take responsibility "for the content of this advertising."

Appellant further contends (J.S. 13) that the disclaimer requirements "deprive[] [appellant] of valuable time in its short and expensive broadcast Ads, which deprivation and burden is not justified by any constitutional or congressional authority." The required written disclaimer, however, may occupy as little as four percent of the vertical height of the television screen, see 11 C.F.R. 110.11(c)(4)(iii)(A), and the oral disclaimer would consist solely of the words "Citizens United is responsible for the content of this advertising," see 2 U.S.C. 441d(d)(2) (Supp. V 2005). Any burden those requirements may impose is not of constitutional dimension.

The disclaimer requirements serve to ensure that voters can properly assign responsibility for advertisements that refer to identified federal candidates during the run-up to elections—and, in particular, to prevent the *mis*attribution of such advertisements to the candidate or her opponent.

Eight Justices in *McConnell* agreed that BCRA's disclaimer provisions are valid as applied to "electioneering communications" generally. 540 U.S. at 230-231; see *id.* at 224 & n.*. This Court's intervening decision in *WRTL* provides no basis for concluding that the disclaimer provisions are unconstitutional as applied to appellant's own advertisements. The fact that appellant's advertisements are not *unambiguously* election-related—*i.e.*, the fact that they may reasonably be construed as something other than an appeal to vote against Hillary Clinton—does not eliminate the risk of voter confusion or misattribution that the disclaimer requirements are intended to address. Because any burden on appellant is minor, and the government's interest is substantial, appellant's as-applied challenge fails.

5. This Court has long recognized that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 U.S. at 42. Thus, even when a particular "electioneering communication" can "reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," *WRTL*, 127 S. Ct. at 2670 (opinion of Roberts, C.J.), and therefore is exempt under *WRTL* from BCRA § 203's ban on corporate treasury financing, the advertisement may still have a practical impact on candidate elections. The lead opinion in *WRTL* did not suggest that, unless a particular "electioneering commu-

nication" is the "functional equivalent" of express advocacy, its potential impact on candidate elections must be ignored altogether. Rather, the opinion analyzed BCRA § 203's treasury-financing ban as a form of "suppression" of corporate speech and concluded that "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent to an election." *Id.* at 2669.[8] The thrust of the opinion was that, if reasonable doubt exists as to whether a particular advertisement constitutes electoral advocacy, "the First Amendment requires [the Court] to err on the side of protecting political speech rather than suppressing it." *Id.* at 2659.

Application of BCRA's reporting and disclaimer requirements, by contrast, cannot plausibly be viewed as "suppression" of speech. To the contrary, enforcement of those requirements *increases* the range of information available to citizens and thereby furthers First Amendment values. See *McConnell*, 540 U.S. at 197 (explaining that "[p]laintiffs' argument for striking down BCRA's disclosure provisions * * * ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace") (quoting *McConnell*, 251 F. Supp. 2d at 237); *Buckley*, 424 U.S. at 82 (characterizing FECA disclosure requirements as "a minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view"). The core rationale of the lead opinion in *WRTL*—*i.e.*, that any ambiguity as to the character of particular advertisements must be resolved in a speech-protective

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[8] Justice Scalia's concurring opinion likewise rested on the view that BCRA § 203 "*bans* vast amounts of political advocacy." 127 S. Ct. at 2684 (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

manner—therefore does not support appellant's as-applied challenge to the very different BCRA provisions at issue here.

CONCLUSION

Assuming that appellate jurisdiction properly lies in this Court, cf. note 1, *supra*, the appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

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Corporate Disclosure Statement

Citizens United has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Argument

The FEC says jurisdiction "is not free from doubt." *Motion to Dismiss or Affirm* ("MDA") 2 n.1. Its argument is based on flawed statutory interpretation, and sound policy supports appellate review.

I. Jurisdiction Exists Because the Three-Judge Court Was "Required by . . . *Congress*."

This Court's jurisdiction is based on the fact that *Congress* "required" a three-judge court, as 28 U.S.C. § 1253 specifies (emphasis added):

> [A]ny party may appeal to the Supreme Court from an order granting or denying . . . any interlocutory . . . injunction in any . . . suit . . . *required by* any Act of *Congress* to be heard by a district court of three judges.

This "congressional-Act requirement," as it will be referenced, is met in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), § 403(a), 116 Stat. 113-14, providing special procedures for constitutional challenges seeking "declaratory or injunctive relief." Section 403 contains an election provision and the congressional-Act requirement.

The election provision is in (d)(2), providing that, for cases filed in 2007 or later, "the provisions of subsection (a) shall not apply to any actions described in such section unless the person filing such action elects such provision to apply to the action." Citizens United elected this "BCRA option," automatically engaging the congressional-Act requirement.

The congressional-Act requirement is in subsection (a)(1), which requires that the case shall be filed in the D.C. district court "and *shall* be heard by a three-judge

court convened pursuant to section 2284 of title 28, United States Code" (emphasis added).[1] Given this congressional-Act requirement for a three-judge court, this Court plainly has jurisdiction.

The FEC asserts that the word "required" may be lifted from its context and governed by either (a) "an[] Act of Congress" or (b) an act of a party, i.e., the "requir[ing]" in § 1253 can be either (a) what *Congress* did by requiring a three-judge court where the BCRA option is elected or (b) what *Citizens United* did by electing the BCRA option.

As to the first option ("required by . . . Congress"), the FEC acknowledges that "once appellant elected [the BCRA option], BCRA 'required' that a three-judge

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[1]Subsection (a) also requires expedition and advancement on the docket and direct appeal of "final decision[s]." "Final decision" is the term of art in 28 U.S.C. § 1291, specifying the cases for which that statute authorizes jurisdiction for courts of appeals, so BCRA merely indicated that such appeals go instead to this Court, as happened in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), and *Davis v. FEC*, No. 07-320 (oral argument set for April 22, 2008).

There was no need to specify in BCRA that interlocutory orders would be directly appealed because the congressional-Act requirement of a three-judge court in BCRA § 403 automatically triggered direct appeal to this Court under 28 U.S.C. § 1253. Courts of appeals have no jurisdiction of interlocutory orders "where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292.

court be convened to decide this case." MDA 2 n.1. This properly focuses on what Congress did.

As to the second option ("required by . . . [a party]"), the FEC argues that "[t]his case was not 'required' to be decided by a three-judge court insofar as appellant could have presented its constitutional claims to a single-judge court." *Id.* This erroneously focuses on what Citizens United did.

"Required" is not a free-floating term. It has a governing context. In the phrase "suit . . . required by . . . Congress . . . ," 28 U.S.C. § 1253, the verb "required" is in the passive voice. In the active voice, the phrase would be "Congress required the suit" (to be heard by a three-judge court), making clear that Congress is the controlling actor. In the passive voice, "suit" becomes the subject and "Congress" is demoted to a prepositional phrase, but the focus of the phrase is still on what *Congress* required.

So in interpreting § 1253, "required" is governed by both the "suit" and "Congress." What is "required" by the "suit" is what is "required by . . . Congress." According to § 1253, if the "suit" (based on Congressional action) and "Congress" require a three-judge court, then the analysis is ended and there is jurisdiction.

Nowhere in § 1253 is there any mention of any "party" or "plaintiff." "Party" is neither the passive-voice subject nor the active-voice subject of "required." Nor is "party" a direct object or part of a prepositional phrase related to "required." The concept of a party "requir[ing]" anything neither appears in § 1253 nor controls its authorization of jurisdiction. The FEC's effort to read "party" into § 1253, as a substitute for

"suit" or "Congress" must be rejected as an illegitimate effort to rewrite the statute.

Citizens United is unable to "require[] by an[] Act of Congress" that there be a three-judge court. Citizens United had no control over what Congress required in BCRA § 403. The only "requir[ing]" that counts in § 1253 is the "requir[ing]" done by Congress. So Citizens United's election to avail itself of the BCRA option is not a "requir[ing]" that is cognizable in § 1253. If "a *suit* [is] required" to be heard by a three-judge court "*by an[] Act of Congress*," such as BCRA § 403, then § 1253 is satisfied and this Court has appellate jurisdiction. This is such a case.

The use of "required" in § 1253 is simply descriptive of situations in which "an[] Act of Congress" has provided that cases be considered by three-judge courts. *See* Eugene Gressman et al., *Supreme Court Practice* 102-17 (9th ed. 2007) (collecting statutes, including BCRA) [hereinafter *Practice*]. It was not the creation of a new class of "required," versus "permissive," three-judge courts to be determined by whether a party had any option other than to bring a challenge in a three-judge court.

The synonymous phrase "required by Act of Congress" appears in 28 U.S.C. § 2284, under which BCRA § 403(a)(1) requires that a three-judge court be convened. Section 2284 provides that "[a] district court of three judges shall be convened when otherwise required by Act of Congress [and in certain apportionment cases]." That statute required the forming of a three-judge panel in the present case, just as it did in *WRTL II*, 127 S. Ct. at 2661, because of the congressional-Act requirement at BCRA § 403(a)(1) ("shall be

heard by a three-judge court convened pursuant to [§ 2284]"). Although the FEC fails to propose it, the same construction of "required" that it seeks to impose on § 1253 would also have to be imposed on § 2284, i.e., the requisite "requir[ing]" would not be limited to an "Act of Congress," but would include the interpolated "act of a party." That interpolation would yield the nonsensical result that Congress authorized the election of the BCRA option, which requires a three-judge court under § 2284, but Congress intended that no three-judge court could convene under § 2284 because the *party* was not "*required*" to elect the BCRA option. The FEC did not challenge the convening of a three-judge court below, indicating that it does not really believe that "required by Act of Congress" also means "required by act of a party."

Three-judge courts and direct appeal have been established as a mechanism for dealing carefully and expeditiously with issues that Congress thought especially important. A three-judge panel (with one court of appeals judge) improved the likelihood that a case would be correctly decided and allowed the elimination of an intermediate panel of three judges before review by this Court. Over time, some of these provisions have been repealed because they were deemed to have outlived their originally-perceived usefulness. *See Practice* 90-91 (collecting repealed provisions). But in BCRA, Congress recognized that it was dealing with core political speech touching on the most foundational elements of self-government by a sovereign people and so "required" that all initial cases filed under BCRA be heard by three-judge courts. It also "required" that the BCRA option would be fully avail-

able to subsequent plaintiffs electing it. In BCRA § 403, Congress specifically provided for direct appeal for "final decisions," but it did not need to do so with respect to a denial of a preliminary injunction because § 1253 clearly provided for such a direct appeal, given Congress' three-judge court requirement in BCRA § 403(a)(1). Given the repeal of many direct appeal provisions, "the coverage of the surviving three-judge court statutes is so narrowly defined as to make a restrictive interpretation [of § 1253] unnecessary and, at least in some circumstances, inconsistent with the intent of Congress." *Practice* 102.

So § 1253 was simply describing a class of cases subject to direct appeal. It was not setting up a class of "required" three-judge cases to be distinguished from those that are merely "permissive"—based on some party election not mentioned in § 1253. Nor is there any evidence that when Congress enacted BCRA § 403 it intended to impose on the federal courts the necessity—every time appellate authority was invoked under § 1253—of determining whether the three-judge court below was really "required" by Congress or merely "permitted" by Congress. The FEC's creative reading of "required" reads into § 1253 just such a distinction, which is wholly without authority and violates the plain language of § 1253.

Moreover, the FEC's attempted substitution of "party" for "Congress" as the subject of who does the "requir[ing]" in § 1253 would yield a curious result if the FEC itself were appealing. Suppose that the district court had granted Citizens United a preliminary injunction and the FEC had appealed that. Where would it go?

Of course, as shown above, since the three-judge Court was "required by an Act of Congress," BCRA § 403(a)(1), this Court would have jurisdiction under § 1253. But the FEC argues that the subject of "required" here is not Congress but Citizens United. To be consistent, the FEC would have to decide that since Citizens United was not "required" to elect the BCRA option, then § 1253 provided this Court no jurisdiction. So the FEC would have to appeal to the D.C. Circuit.

Of course, the D.C. Circuit would likely look at § 1253 and see that *Congress* is supposed to do the essential "requir[ing]," not any *party*, and would dismiss the appeal because its own jurisdictional statute, 28 U.S.C. § 1292, denies it jurisdiction "where a direct review may be had in the Supreme Court."

This is what happened in an attempted appeal of the denial of a preliminary injunction to the D.C. Circuit early on in *WRTL II*. 127 S. Ct. 2652. For the Court's convenience, the unpublished opinion in *Wisconsin Right to Life v. FEC*, No. 04-5992, 2004 WL 1946452 (D.C. Cir. Sep. 1, 2004) (per curiam), is appended. WRTL sought an expedited appeal of its preliminary injunction denial by a three-judge court and an injunction pending appeal. Responding to the FEC's motion to dismiss for lack of jurisdiction, the D.C. Circuit court noted that its jurisdiction would come from 28 U.S.C. § 1292, which precluded it "'where a direct review may be had in the Supreme Court.'" App. at1a (emphasis and citation omitted). Turning to 28 U.S.C. § 1253, the circuit court noted that § 1253 provided jurisdiction to the Supreme Court (where Congress had required a three-judge court) "'[e]xcept as otherwise provided by law.'" App. at 2a (emphasis and

citation omitted). The circuit court noted that "BCRA says nothing about judicial review of interlocutory orders and thus does not 'provide[] by law' that a party cannot appeal denials of such orders to the Supreme Court." App. at 2a. The circuit court dismissed the appeal "because BCRA does not preclude Supreme Court review of the appellant's appeal, § 1253 permits it, and § 1292 thus does not authorize review by this court." App. at 2-3a.

So if the FEC were appealing the grant of a preliminary injunction to the D.C. Circuit, that court would surely dismiss the case for lack of jurisdiction. Yet the FEC insists that Citizens United should have gone there because the D.C. Circuit would be persuaded by the FEC's flawed argument that when Congress in § 1253 specified that *Congress* must "require[]" a three-judge court it really meant that a *party* must "require[]" it.

Perhaps the FEC would argue that *it* should be able to appeal the grant of a preliminary injunction to this Court because it had no say in whether Citizens United elected the BCRA option. That would be inconsistent with the FEC's argument that the three-judge court was "required" by Citizens United in such a way that § 1253 precludes jurisdiction. And it would require yet another criterion to be read into § 1253, i.e., that "required" is established by party election, except in the case where a party has no election. That is a lot to read into a jurisdictional statute that is clear in its criterion that *Congress* must require the three-judge court, not a party. Section 1253 authorizes no such creative rewriting.

Section 1253 is clear. *Congress* must "require[]" the three-judge court. In BCRA § 403(a)(1), Congress did that. The criterion is met. This Court has jurisdiction.

II. Sound Policy Supports Jurisdiction.

There are good reasons why this Court should have and exercise jurisdiction. *WRTL II* recognized that preliminary injunctions serve a vital function in the First Amendment context. This function was set out in the *Jurisdictional Statement*, both in the Introduction, JS 1, and Part I, JS 15-16, so it need not be fully restated. But it should be noted that in many free speech contexts, as here, the denial of a preliminary injunction forever slams the window on the unique opportunity to speak for which injunctive relief is sought. *See* JS 13-14 (outlining Citizens United's lost opportunities if a preliminary injunction is denied)). Given the denial of timely injunctive relief to WRTL in *WTRL II*, 127 S. Ct. at 2661, and the denial of relief by the court below in the present case, it is clear that there needs to be a mechanism for expeditious appeal of preliminary injunction denials in order to protect free speech.

Congress recognized that BCRA operates in an especially-sensitive area that requires the special procedures provided in BCRA § 403(a) for cases seeking "declaratory or injunctive relief." BCRA requires advancement on the docket and expedition, specifies a district court that has considerable experience with campaign-finance law, requires a three-judge court so that multiple judges (including one appellate judge) can consider the issues in the first instance, and provides for expeditious, direct appeal to this Court,

bypassing the court of appeals. But even those procedures are an inadequate remedy to safeguard core First Amendment rights in the sensitive, highly-protected areas regulated by BCRA if the appeal to this Court is limited only to "a final decision" by the three-judge court. When preliminary injunctions are required in this unique context, wending through yet another court is too time-consuming.

BCRA's uniqueness not only demonstrates why cases in its subject area require the special procedures, including direct appeal, but it also should alleviate any institutional concern that this Court may have about being required to deal with numerous preliminary injunction appeals. Congress no longer requires three-judge courts in many contexts, resolving prior concerns about inundation.[2] But Congress has deemed the BCRA context to specially require both a three-judge court and the other special procedures, including direct appeal. Not many cases will fall within the scope of BCRA and also require consideration of a preliminary injunction on appeal. This Court has several years of

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[2]As set out in *Practice*, at 101:

> Although a few three-judge court statutes are still on the books, not many cases now arise under them, and the Court can no longer be said to be severely overburdened by the few appeals from three-judge district courts that are now being filed and heard. In the 1981 Term only 12 such appeals were acted upon by the Court, of which 4 were accepted for oral argument; in the 1990 Term, the numbers were 9 and 3; in the 1999 Term, the numbers were 8 and 2; and in the 2004 [T]erm the numbers were two and zero.

experience with BCRA (2002) in place from which it can readily determine that this is an accurate description. And with *McConnell*, 540 U.S. 93, *WRTL II*, 127 S. Ct. 2652, and, shortly, *Davis v. FEC*, No. 07-320, already decided, the number of BCRA provisions that might be challenged in this Court has been reduced.

Finally, if this Court provides clarifying standards on preliminary injunctions in this sensitive First Amendment context, along the lines that it provided for as-applied challenges in *WRTL II*, 127 S. Ct. at 2666-67, then in future cases the district court below should be more protective of First Amendment rights than it was in *WRTL II* and the present case. So exercising jurisdiction in this case should reduce the need for future appeals of preliminary injunction denials. And perhaps another WRTL would not have to wait years to gain recognition for its right to speak at a time when it really mattered—an opportunity forever lost without a preliminary injunction.

Conclusion

For the foregoing reasons, this Court has jurisdiction. But if this Court decides that it does not, Citizens United asks the Court to vacate the order appealed from and remand the case to the district court with instructions to enter a new order, so that Citizens United may perfect an appeal there.[3]

---

[3]The time for noticing appeal in the D.C. Circuit has expired. In a similar situation, where this Court determined that it lacked jurisdiction under 28 U.S.C. § 1253 because "a three-judge court was improperly convened," this Court vacated judgment and remanded for "a fresh decree" so

(continued...)

Respectfully submitted,

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[3](...continued)
appellant could timely appeal to the court of appeals. *Moody v. Flowers*, 387 U.S. 97, 102 (1967). *See also Gonzalez v. Automatic Employess Credit Union*, 419 U.S. 90, 101 (1974) (absent jurisdiction, court remanded for fresh order permitting timely appeal).

Appendix

Opinion of U.S. Court of Appeals,
District of Columbia Circuit

[Filed Sep. 1, 2004; 2004 WL 1946452 (C.A.D.C)]

United States Court of Appeals,
District of Columbia Circuit

WISCONSIN RIGHT TO LIFE, INC., Appellant
v.
FEDERAL ELECTION COMMISSION, Appellee
No. 04-5292.

Sept. 1, 2004.

[Westlaw counsel listing omitted.]

BEFORE: HENDERSON, ROGERS, and GARLAND, Circuit Judges.

ORDER

PER CURIAM.

*1 Upon consideration of the emergency motion for injunction pending appeal, the motion to expedite disposition, the combined opposition thereto, and the reply; the motion to dismiss appeal and the response thereto, it is

ORDERED that the motion to dismiss be granted.

This court's jurisdiction over this appeal, if it exists, must come from 28 U.S.C. § 1292 (2000). That statute vests the courts of appeals with appellate jurisdiction over "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying,

refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, *except where a direct review may be had in the Supreme Court." Id.* (emphasis added). Thus, whether this court has jurisdiction depends on whether the appellant may appeal directly to the Supreme Court from the three-judge court's denial of its request for a preliminary injunction. That inquiry is governed by 28 U.S.C. § 1253 (2000), which states that *"[e]xcept as otherwise provided by law,* any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." *Id.* (emphasis added). Thus, whether the Supreme Court has jurisdiction over the appeal from the three-judge court's denial of the request for a preliminary injunction depends on whether another law provides an exception to the authorization of § 1253. The only law to which the appellant points is the Bipartisan Campaign Reform Act (BCRA) of 2002, § 403(a)(3), 2 U.S.C.A. § 437h note (West Supp. 2003), which states that "[a] *final decision in the action* shall be reviewable only by appeal directly to the Supreme Court of the United States." *Id.* (emphasis added). BCRA says nothing about judicial review of interlocutory orders and thus does not "provide[ ] by law" that a party cannot appeal denials of such orders to the Supreme Court. Accordingly, because BCRA does not preclude Supreme Court review of the appellant's appeal, § 1253 permits it, and § 1292 thus does not authorize review by this court. It is

FURTHER ORDERED that the emergency motion for injunction pending appeal and motion to expedite disposition be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C.Cir. Rule 41.

C.A.D.C.,2004.
Wisconsin Right to Life v. Federal Election Com'n
Not Reported in F.3d, 2004 WL 1946452 (C.A.D.C.)

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No. 07-953

In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL REPLY BRIEF FOR THE APPELLEE

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In the Supreme Court of the United States

No. 07-953

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL REPLY BRIEF FOR THE APPELLEE

A. Congress Has Not "Required" This Case To Be Decided By A Three-Judge District Court

Our supplemental brief explains why this Court lacks jurisdiction over appellant's interlocutory appeal from the decision of the three-judge district court denying preliminary injunctive relief. Appellant contends (Supp. Br. 1-7) that the government's position is inconsistent with the language of 28 U.S.C. 1253, under which the Court's jurisdiction over this appeal turns on whether appellant's suit is "required by any Act of Congress to be heard and determined by a district court of three judges." That argument lacks merit.

Appellant correctly explains (see Supp. Br. 3) that, under the plain terms of Section 1253, the relevant question is whether *Congress* has "required" this suit to be adjudicated by a three-judge district court, not whether *appellant* has

"required" the suit to be heard by such a tribunal. That premise, however, self-evidently does not support appellant's contention that its suit falls within Section 1253's coverage. Congress cannot naturally be said to have "required" a three-judge court when it authorized a private party to *choose* a different court. See Gov't Supp. Br. 6. Indeed, if Section 1253 were rewritten in the way that appellant accuses the government of attempting to rewrite it (*e.g.*, Appellant Supp. Br. 2)—*i.e.*, as making this Court's jurisdiction contingent on whether the *plaintiff* has "required" the suit to be heard by a three-judge court—appellant's argument that Section 1253 applies here would be much stronger. It is precisely because Section 1253 focuses on whether *Congress* has "required" adjudication by a three-judge court that the statute is not triggered when the use of such a court depends on a plaintiff's election.

At most, appellant's focus on whether Congress has required a three-judge panel for this suit exposes the ambiguity of the phrase "action, suit or proceeding" in 28 U.S.C. 1253. To the extent that phrase refers to the suit actually filed subsequent to the plaintiff's election of a three-judge panel, then at that point a three-judge panel is required. To the extent it refers to the suit in the abstract (*i.e.*, the substantive claims asserted) before the election takes place, then a three-judge panel is not required because a suit asserting the same legal claims could have been filed before and heard by a single judge.[1] This simply restates the alternatives of looking at the question from the perspective of the district court (three-judge panel required) or the

[1] BCRA § 403(d)(2) appears to support the latter reading because it refers to "any action" as a broad concept and allows the plaintiff to elect to have the three-judge court provisions "apply to the action." 116 Stat. 114. That wording suggests that the plaintiff's election of a three-judge court is distinct from, rather than part of, the pre-existing "action."

litigant (not required). The difficulty of concluding that a non-mandatory three-judge panel is "required," especially when Section 1253 is read in light of rules of construction disfavoring piecemeal appeals to this Court, counsels in favor of resolving those ambiguities against jurisdiction.

Appellant's reliance (Supp. Br. 7-8) on *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-5992, 2004 WL 1946452 (D.C. Cir. Sept. 1, 2004) (*WRTL*), is misplaced. Because the suit in *WRTL* was filed before December 31, 2006, the three-judge procedure was mandatory rather than elective. See Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 403(d)(1), 116 Stat. 114. Under the law in effect at that time, the suit was unambiguously "required" by BCRA to be adjudicated by a three-judge court, and the District of Columbia Circuit correctly held that the plaintiff's interlocutory appeal lay to this Court rather than to the court of appeals. The court in *WRTL* had no occasion to apply 28 U.S.C. 1253 to a post-2006 suit, in which the three-judge court procedure is elective rather than mandatory.[2]

B. Appellant's Policy Arguments Lack Merit

Appellant contends that construing 28 U.S.C. 1253 to apply in these circumstances would represent a wise policy choice because "there needs to be a mechanism for expeditious appeal of preliminary injunction denials [in suits chal-

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[2] Appellant speculates (Supp. Br. 8) that, if the plaintiff in a post-2006 challenge to BCRA elected a three-judge district court and the court granted a preliminary injunction, the FEC would argue that the injunction was reviewable by this Court. As the government's supplemental brief explains (at 9 n.2), however, we agree with appellant that both grants and denials of preliminary injunctive relief in such cases would be reviewable in the same manner. The FEC's appeal from a preliminary injunction issued by a three-judge court in a post-2006 suit would therefore lie to the court of appeals rather than to this Court.

lenging BCRA] in order to protect free speech." Appellant Supp. Br. 9; see *id.* at 9-11. But the question here is not *whether* such a mechanism will be provided; the question is only which court will furnish that mechanism. This Court's cases establish a preference for having the court of appeals perform that role.

1. This Court has consistently interpreted Section 1253 in light of the "overriding policy, historically encouraged by Congress, of *minimizing* the mandatory docket of this Court in the interests of sound judicial administration." *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974) (emphasis added); see Gov't Supp. Br. 5. That policy, the Court has stated, "must be applied with redoubled vigor when the action sought to be reviewed here is an interlocutory order of a trial court." *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970).

Without explicitly acknowledging that established rule of construction, appellant suggests (Supp. Br. 6, 10) that such an interpretive approach is no longer appropriate because Congress has reduced the range of circumstances in which three-judge courts are required. This Court, however, has never disavowed the canon of construction set forth in such cases as *Gonzalez* and *Goldstein*. And, to the extent that the overall coverage of three-judge court statutes has declined during the years since those decisions were issued, that fact simply suggests that Congress has embraced the view that this Court's mandatory jurisdiction should be minimized. Indeed, BCRA itself reflects Congress's determination that, in constitutional challenges to that statute, the three-judge court procedure was essential (*i.e.*, required) only during a relatively brief period following the law's enactment (*i.e.*, in suits filed on or before December 31, 2006). See BCRA § 403(d), 116 Stat. 114.

2. If this Court finds jurisdiction lacking under Section 1253, the courts of appeals will provide "a mechanism for expeditious appeal of preliminary injunction denials" (Appellant Supp. Br. 9) under 28 U.S.C. 1292(a)(1) in post-2006 constitutional challenges to BCRA.[3] Not only is that result consistent with the preference reflected in *Gonzalez* and *Goldstein*, but it has practical advantages as well. In many instances, particularly when a preliminary injunction is denied at a time when this Court is in recess, the court of appeals may be better positioned to give expeditious attention to such an appeal. See Gov't Supp. Br. 9.

The court of appeals' decision in such a case is in turn reviewable by this Court under 28 U.S.C. 1254(1). Indeed, because Section 1254 vests this Court with certiorari jurisdiction over "[c]ases in the courts of appeals," the Court has authority (albeit authority that is very rarely exercised) to hear such a case even before the court of appeals renders its decision. See 28 U.S.C. 2101(e); S. Ct. R. 11; *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947)

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[3] Without citing any statute or rule, appellant states (Supp. Br. 11 n.3) that "[t]he time for noticing appeal in the D.C. Circuit has expired." That is incorrect. See Gov't Supp. Br. 10 n.3. The district court's decision denying appellant's request for a preliminary injunction was issued on January 15, 2008. BCRA § 403(a)(3)'s ten-day deadline for filing a notice of appeal applies only to an appeal to this Court from a "final decision" of the three-judge district court. 116 Stat. 114. If this Court lacks jurisdiction pursuant to 28 U.S.C. 1253, then the 30-day deadline in 28 U.S.C. 2101(b) is likewise inapplicable. Rather, the time for filing a notice of appeal to the court of appeals is governed by the generally applicable provisions of 28 U.S.C. 2107(b) and Federal Rule of Appellate Procedure 4(a)(1)(B), which establish a 60-day deadline in civil cases to which a federal agency (here, the FEC) is a party. Thus, appellant can still preserve its option to file a timely appeal to the District of Columbia Circuit if it files a protective notice by March 17, 2008. See Gov't Supp. Br. 10 n.3.

(Court granted certiorari before judgment to review a preliminary injunction issued by the district court). Even if Section 1253 is held to be inapplicable to post-2006 BCRA challenges in which the plaintiff elects the three-judge court procedure, this Court therefore will have ample authority to hear such cases and to provide whatever clarification it deems necessary concerning either the applicable First Amendment principles or the standards governing preliminary injunctive relief.

Thus, the disputed jurisdictional question in this case goes not to this Court's *power* to resolve interlocutory disputes in constitutional challenges to BCRA, but to its *duty* to do so. Appellant identifies no reason to conclude (or to suppose that Congress concluded) that recognition of such a duty would be sound policy.[4]

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[4] The appeal in this case presents a relatively pure question of law—*i.e.*, whether advertisements that fall within BCRA's definition of "electioneering communication," BCRA § 201(a) (2 U.S.C. 434(f)(3) (Supp. V 2005)), but that do not constitute the "functional equivalent of express advocacy" under the lead opinion in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2667 (2007) (opinion of Roberts, C.J.), may constitutionally be subjected to BCRA's reporting and disclaimer requirements. Under appellant's construction of 28 U.S.C. 1253, however, this Court would also have been required to review the district court's factbound ruling (see J.S. App. 10a-11a) that "Hillary: The Movie" is the functional equivalent of express advocacy if appellant had chosen to appeal the district court's denial of preliminary injunctive relief with respect to the film itself. More generally, determining (sometimes on the basis of an incomplete record) whether a particular plaintiff has established a substantial likelihood of success on the merits of its constitutional claim, and assessing the relative harms to the parties of granting or withholding interim relief, will rarely be a sound use of this Court's resources. BCRA § 403(a)(3)'s grant of a right of appeal to this Court from the district court's "final decision" in this case is itself a significant deviation from the generally discretionary character of this Court's docket. That deviation, however, is mandated by BCRA's plain

* * * * *

For the reasons stated above and in the FEC's supplemental brief, the appeal should be dismissed for lack of jurisdiction. In the alternative, for the reasons explained in the FEC's motion to dismiss or affirm, the appeal should be dismissed for lack of a substantial federal question, or the judgment of the district court should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MARCH 2008

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text. Neither BCRA nor 28 U.S.C. 1253 contains a comparable directive that this Court entertain appellant's direct appeal from the interlocutory order at issue here.

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No. 07-953

In The
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CITIZENS UNITED, *Appellant,*
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FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
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Reply to *Supplemental Brief for Appellee*

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March 13, 2008

Corporate Disclosure Statement

Citizens United has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Argument

The FEC errs in not applying the actual *language* of 28 U.S.C. § 1253 and ignoring congressional intent in *continuing* to provide BCRA's special procedures.

I. The Actual *Language* of § 1253 Controls.

The FEC quotes § 1253, FEC-Br. 5, but ignores its actual requirement. Congress gave this Court jurisdiction over appeals from "interlocutory or permanent injunction[s] in any . . . suit . . . required *by any Act of Congress* to be heard and determined by a district court of three judges" (emphasis added). The italicized language resolves the present issue. As set out in Appellant's prior brief, CU-Br. 1-9, the sole focus of "required" is what *Congress* "required" not what a *plaintiff* elected. Citizens United was categorically incapable of requiring anything *"by an[] Act of Congress."* It neither is Congress nor controls Congress.

The jurisdictional question is simple: Was there "an Act of Congress" that "required" convening a three-judge court? The same question faced the district court under 28 U.S.C. § 2284: Was there an "Act of Congress" that "required" it to convene a three-judge court?

There was such an "Act of Congress" that required the three-judge Court—Public Law 107-155 or BCRA. Section 403 sets out procedures governing constitutional challenges. Subsection (a) requires that challenges "shall be heard by a 3-judge court convened pursuant to section 2284 . . . ." Section 1253's jurisdictional requirement is met.

The only exception would be if subsection (a) were inapplicable. Subsection (d) governs the "applicability"

of (a). Subsection (a) is inapplicable only if a plaintiff after 2007 did not elect that it apply.

So a three-judge court is "required by an[] Act of Congress," 28 U.S.C. § 1253, under BCRA § 403(a), whenever BCRA § 403(a) is applicable, under BCRA § 403(d), with "applicability" determined by election. The question of whether a three-judge court is "required by an[] Act of Congress," under § 1253, must be answered only by looking to BCRA § 403(a), which is the only provision that addresses Congressional requirement of a three-judge court. Subsection (d) only answers the question of whether subsection (a) is applicable. If subsection (a) is applicable, it "require[s]" a three-judge court by congressional act, which triggers operation of 28 U.S.C. § 2284 (convening three-judge court) and 28 U.S.C. § 1253 (jurisdiction of appeals from interlocutory injunctions).

The FEC slips the question of whether a three-judge court is "required" from BCRA § 403(a) down to subsection (d). *See* FEC-Br. 3-7. But any "elect[ion]" in subsection (d) is *not* a "require[ment] by an[] Act of Congress, as § 1253 mandates. It is merely an election by a plaintiff. Section 1253 requires a search for a "require[ment]" done by *Congress*. BCRA § 403(a) provides that. Subsection (d) does not. Seeking in subsection (d) for the *congressional* "require[ment]" of a three-judge court that § 1253 mandates is searching for oranges at an apple stand.

Since 28 U.S.C. § 1253 is clear and plainly provides jurisdiction because its sole criterion is met by BCRA § 403(a), there is no warrant to search for interpretation principles. Yet the FEC does.

The FEC notes that this Court has declined direct appeals where a three-judge court was improperly convened, but concedes that "the three judge court in this case was properly convened after appellant elected that procedure . . . ." FEC-Br. 4. This is an important concession because 28 U.S.C. § 2284 requires the convening of a three-judge court where "required by Act of Congress." The FEC did not challenge the convening of the three-judge court and does not challenge it now, which means that the three-judge Court was "required by Act of Congress," which is the same trigger as § 1253's "required by an[] Act of Congress." The "require[ment] by . . . Congress" in both statutes is satisfied by BCRA § 403(a), and both statutes are applied in the context of the plaintiff having elected for subsection (a) to be applicable under subsection (d). The concession that the three-judge Court was "required by Act of Congress" for purposes of § 2284 vitiates the FEC's argument that the three-judge court was not "required by an[] Act of Congress" for purposes of § 1253. The FEC's inconsistent arguments as to §§ 1253 and 2284 reveal the weakness of its jurisdictional argument.

The identical triggering requirement in §§ 1253 and 2284 reveal that Congress could not have intended to grant a three-judge court without also granting direct appeal under § 1253. Identical triggers mean that the FEC's argument as to § 1253 precludes a three-judge court under § 2284. To be consistent, the FEC must say that, since a plaintiff is not required to elect the BCRA option, the "required by Act of Congress" trigger in § 2284 is not met and BCRA plaintiffs get no three-judge courts. But Congress clearly intended that

plaintiff election under BCRA § 403(d) would make the congressional three-judge court requirement in § 403(a) applicable and so meet the "required by Act of Congress" trigger of § 2284. The FEC concedes this congressional intent by arguing that a plaintiff making the election under § 403(d) gets a three-judge court. FEC-Br. 7, 10-11. But since the triggers are the same, if Congress intended a three-judge court it also intended jurisdiction under § 1253.

Congress must be presumed to know its own statutes. *Cf. McConnell v. FEC*, 540 U.S. 93, 211 (2003) (Congress presumed to know of this Court's decisions). So it must be presumed to have known that § 1253 had the same trigger as § 2284. That is why there was no need to "establish a BCRA-specific mechanism for appealing an interlocutory order." FEC-Br. 2. Congress knew that there was such a mechanism in § 1253, triggered by its requirement of a three-judge court in BCRA § 403(a). So it must be presumed that if Congress intended that the trigger in 28 U.S.C. § 2284 would be met, then it intended that the identical trigger in § 1253 would also be met. The FEC's arguments fail to overcome this necessary presumption of congressional knowledge and intent.

The FEC argues that "this Court has applied a rule of narrow construction" in resolving "doubtful questions" under § 1253. FEC-Br. 5. Nothing is "doubtful" here, so construction rules are unneeded. And the rule referenced came from before Congress repealed most direct appeals, so that "[t]he basic reasons for construing the statutes so strictly have large disappeared." *See* Eugene Gressman et al., *Supreme Court Practice* 100-01 (9th ed. 2007). In its prior brief, Appellant discussed

how this has resolved inundation concerns and cited the opinion in *Supreme Court Practice* that "the Court can no longer be said to be overburdened by the few appeals from three-judge district courts that are now being filed and heard." CU-Br. 10 n.2 (citation omitted). That authority also notes that the repeals call into question the "rule of narrow construction" that the FEC now cites: "[T]he coverage of the surviving three-judge court statutes is so narrowly defined as to make a restrictive interpretation unnecessary and, at least in some circumstances, inconsistent with the intent of Congress." *Supreme Court Practice* 102.

Moreover, the same Congress cited in *Goldstein v. Cox*, 396 U.S. 471, 478 (1970), as having the purpose of narrowly confining this Court's docket, *see* FEC-Br. 5, specifically enacted a new direct appeal statute, BCRA § 403(a), both for "final decisions" and interlocutory appeals (because Congress must be presumed to have known of § 1253). A congressional intent to limit direct appeals that is evident in the repealing of direct-appeal requirements cannot logically be argued as the basis for avoiding direct appeals where the same Congress expressly enacted this new direct-appeal statute. Congress intended no rule of narrow construction.

II. Congressional Intent in *Allowing* the BCRA Option Controls.

BCRA is unique in allowing continued plaintiff election of the special procedures of BCRA § 403(a). The FEC concedes uniqueness, FEC-Br. 4, but ignores its implications for congressional intent. Congress recognized that BCRA operates in an especially-sensitive area that requires the special procedures. Congress has done this in other important contexts, as

when civil rights are violated in public accommodations, where the Attorney General may elect a single- or three-judge court, with expedition similarly required. *See* 42 U.S.C. § 2000a-5.[1]

Congress believed that plaintiffs should continue to have access to § 403(a)'s special procedures—for plaintiffs finding more benefits than detriments in them. Congress indicated no intent to diminish the special procedures after 2006. BCRA's uniqueness shows the high value Congress placed on plaintiffs having undiminished access to the special procedures. This intent requires an approach that seeks to affirm and promote the special protections that Congress afforded plaintiffs against BCRA.

The FEC seeks instead to limit protection by an appeal to "Congress's broader purposes," FEC-Br. 7-9, and the other "benefits of . . . election." FEC-Br. 10-11.

As to "broader purposes," the FEC argues that what Congress was really trying to avoid was "'improvident doom at the hands of a single judge.'" FEC-Br. 7 (citation omitted).[2] The implication is that the only

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[1]This unilateral election of three-judge courts answers the "asymmetry" argument. FEC-Br. 10-11 n.2. BCRA § 403(a) allows direct appeal of "final decisions" although plaintiff elected the three-judge court. Strict scrutiny even imposes asymmetrical burdens on the government.

[2]The FEC here seeks to justify a rule of narrow construction for § 1253 by quoting a holding that a direct appeal would be heard "'only where such an order rests upon resolution of the merits of the constitutional claim presented below.'" FEC-Br. 7 (citation omitted). Whether

(continued...)

purpose served by a three-judge court statute was to avoid consideration of important constitutional matters by a single judge and Congress didn't care about direct appeals. But that is not so, else Congress would not have provided direct appeals, as to interlocutory and permanent injunctions, from three-court decisions in § 1253 (and in such specific provisions as BCRA § 403). Congress implemented three-judge court requirements and direct appeal so that in highly important matters the additional step of having a matter heard by three judges could be skipped. A three-judge district court essentially acts as the usual three-judge panel, thereby allowing the appellate process to skip a step. *Cf.* 2 U.S.C. § 437h (skipping district court by requiring cases challenging FECA provisions to be immediately certified by the district court to the court of appeals for en banc review). These statutes are not just about providing multiple judges but are also about expedited appellate review (by removing one of the usual layers), judicial economy, and the importance of the matters under consideration.

The FEC relies on the fact that Congress did not mandate BCRA § 403(a) procedures after 2006, arguing that Congress apparently did not think them necessary. FEC-Br. 8-9. This argument would mean that a three-judge court shouldn't be available either,

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[2](...continued)
the former rule of narrow construction survives has been discussed, but the denial of the present preliminary injunction did "rest[] upon the merits," as the FEC concedes. FEC-Br. 8. So the FEC's point that "it [is not] sufficient that a three-judge court was *properly* convened," FEC-Br. 6, goes nowhere, even if the "resolution of the merits" rule applies.

because Congress did not make it necessary. But the FEC's essential flaw is in ignoring the implications of Congress continuing to make BCRA procedures available, which indicates that Congress thought that the special procedures are essential to plaintiffs finding them useful. It is illogical to argue that Congress thought special procedures were unimportant because it no longer *requires* them. when Congress has taken the extraordinary step of *requiring* them for plaintiffs electing them.

Finally, the FEC argues that if dismissed Appellant "will receive every procedural safeguard specified in BCRA § 403(a) itself." FEC-Br. 10. As already discussed, Congress would have intended to include interlocutory direct appeals under § 1253 without mentioning them because it knew that the three-judge court would trigger them. It intended jurisdiction, and this sort of case requires this Court's prompt review of preliminary injunctions.

Conclusion

This Court has jurisdiction.[3]

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[3]In light of the time for notice of appeal to the court of appeals expiring on March 17, if this Court dismisses this appeal for lack of jurisdiction on or after that date, Appellant requests a remand for a fresh order from the district court.

Respectfully submitted,

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